

1
No. 93-6497-CFH
Status: GRANTED
CAPITAL CASE

Title: Frank B. McFarland, Petitioner
v.
James A. Collins, Director, Texas Department of
Criminal Justice, Institutional Division

Docketed:

October 26, 1993

Court: United States Court of Appeals for
the Fifth Circuit

See also:

93-6483

Counsel for petitioner: Welch, Mandy

Counsel for respondent: Morales, Dan

Entry	Date	Note	Proceedings and Orders
-------	------	------	------------------------

1	Oct 26 1993	G	Application (A93-375) for a stay of execution, submitted to Justice Scalia.
2	Oct 26 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 26 1993	X	Supplemental brief of petitioner McFarland filed.
5	Oct 26 1993		Application (A93-375) referred to the Court by Justice Scalia.
6	Oct 27 1993		Application (A93-375) granted by the Court.
7	Nov 10 1993		DISTRIBUTED. November 24, 1993 (Page 25)
8	Nov 19 1993	X	Reply brief of petitioner filed.
10	Nov 29 1993		Petition GRANTED. limited to Question 2 presented by the petition. *****
11	Jan 13 1994		Brief amicus curiae of American Bar Association filed.
12	Jan 13 1994		LODGING consisting of ten copies of five documents submitted by amicus curiae American Bar Association,
13	Jan 13 1994		Brief amici curiae of American Civil Liberties Union, et al. filed.
14	Jan 13 1994		Brief amicus curiae of Texas Criminal Defense Lawyers Association filed.
15	Jan 13 1994		LODGING consisting of ten copies of exhibits submitted by Texas Criminal Defense Lawyers Association as amicus curiae.
16	Jan 21 1994		Brief of petitioner Frank B. McFarland filed.
18	Jan 21 1994		Joint appendix filed.
19	Feb 2 1994		SET FOR ARGUMENT TUESDAY, MARCH 29, 1994. (2ND CASE).
21	Feb 8 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
20	Feb 9 1994		CIRCULATED.
22	Feb 10 1994		Record filed.
		*	Original proceedings United States District Court, Northern District of Texas (2 BOXES)
26	Feb 11 1994	X	Brief amicus curiae of Criminal Legal Justice Foundation filed.
23	Feb 14 1994	X	Brief amici curiae of California, et al. filed.
24	Feb 14 1994	X	Brief amici curiae of Tarrant, Bexar, Dallas and Harris County District Attorneys filed.
25	Feb 14 1994	X	Brief of respondent James Collins, Director filed.
27	Mar 17 1994	X	Reply brief of petitioner filed.
30	Mar 24 1994		Petitioner's supplemental appendix filed.

No. 93-6497-CFH

Entry Date Note

Proceedings and Orders

31 Mar 29 1994

ARGUED.

No. 93-6497

(2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division,

Respondent.

RECEIVED

OCT 26 1993

OFFICE OF THE CLERK
SUPREME COURT, U.S.

~~Edged~~

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A DEATH PENALTY CASE: PETITIONER IS
SCHEDULED TO BE PUT TO DEATH SHORTLY AFTER
12:00 a.m. ON OCTOBER 27, 1993

* Mandy Welch
Joe Margulies
Brent Newton
Texas Resource Center
3223 Smith St., Ste. 215
Houston, Texas 77006
713-522-5917

* Counsel of record
Temporary Counsel for Petitioner

4100

QUESTIONS PRESENTED

1. Did the Court of Appeals err by refusing to grant Petitioner's Application for a Certificate of Probable Cause and Stay of Execution under the standard set forth by this Court in Barefoot v. Estelle, 463 U.S. 880 (1983)?
2. (a) Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651(a), in order to appoint counsel for an indigent pro se death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

(b) The Fifth, Ninth, and Eleventh Circuits have taken divergent positions on this important issue. Should this Court grant certiorari to resolve the circuit split?
3. Assuming *arguendo* that there was no statutory basis for jurisdiction to grant a stay in the instant case, did the Constitution nevertheless require the lower courts to stay Petitioner's imminent execution so that habeas counsel could be obtained for Petitioner, a pro se indigent death row inmate?

TABLE OF AUTHORITIES

CASES

<u>Ake v. Oklahoma</u> , 470 U.S. 68 (1985)	22
<u>Anderson v. Creighton</u> , 483 U.S. 635 (1987)	6
<u>Atlantic Coast Line R.R. Co. v. Brotherhood of Local Eng.</u> , 398 U.S. 281 (1970)	14
<u>Barefoot v. Estelle</u> , 463 U.S. 880 (1983)	2, 6
<u>Ex Parte Bollman</u> , 8 U.S. (4 Cranch.) 75 (1807)	24
<u>Bounds v. Smith</u> , 430 U.S. 817 (1977)	17, 18
<u>Brown v. Vasquez</u> , 743 F. Supp. 729 (C.D. Cal. 1990)	13
<u>Brown v. Vasquez</u> , 952 F.2d 1164 (9th Cir. 1991). 4, 5, 6, 8, 9, 10, 12	
<u>Case v. Nebraska</u> , 381 U.S. 336 (1965)	23
<u>City of Lakewood v. Plain Dealer</u> , 486 U.S. 750 (1988)	17
<u>Coleman v. Vasquez</u> , 771 F. Supp. 300 (N.D. Cal. 1991)	13
<u>Douglas v. California</u> , 372 U.S. 353 (1963)	22
<u>Duff-Smith v. Collins</u> , 973 F.2d 1175 (5th Cir. 1992)	13
<u>Fay v. Noia</u> , 372 U.S. 391 (1963)	23
<u>Giarratano</u> , 109 S. Ct. at 2272-73	17
<u>Gilmore v. Taylor</u> , 113 S. Ct. 2112 (1993)	6
<u>Grievance Committee of State Bar v. Dean</u> , 190 S.W.2d 126 (Tex.Civ.App. 1945)	19
<u>Griffin v. Illinois</u> , 351 U.S. 12 (1956)	22
<u>Hardwick v. Doolittle</u> , 558 F.2d 292 (5th Cir. 1977)	23
<u>Henry v. First National Bank of Clarksdale</u> , 595 F.2d 291 (5th Cir. 1979)	14

<u>ITT Community Develop. Corp. v. Barton</u> , 569 F.2d 1351 (5th Cir. 1978)	13
<u>Johnson v. Avery</u> , 393 U.S. 483 (1969)	19
<u>Kuhlmann v. Wilson</u> , 477 U.S. 436 (1986)	15
<u>In re Lindsey</u> , 875 F.2d 1502 (11th Cir. 1989)	10
<u>In re Lindsey</u> , 875 F.2d 1518 (11th Cir. 1989)	11
<u>Marks v. United States</u> , 430 U.S. 188 (1977)	17
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976)	22
<u>McCleskey v. Zant</u> , 111 S. Ct. 1454 (1991)]	13
<u>McFarland v. Collins</u> , No. 4:93-CV-714-A (N.D. Tex. October 25, 1993)	5, 6
<u>Merrimack River Savings Bank</u> , 219 U.S. 527 (1911)	13
<u>Mooney v. Collins</u> , No. 6:92CV254 (E.D. Tex. April 30, 1992)	10
<u>Murray v. Giarratano</u> , 109 S. Ct. 2765 (1989) ...	5, 10, 17, 19, 20, 21, 22
<u>Orisini v. Wallace</u> , 913 F.2d 474 (8th Cir. 1990)	23
<u>Rose v. Lundy</u> , 455 U.S. 509 (1982)	17
<u>Steffen v. Tate</u> , No. C-1-92-495 (S.D. Ohio June 18, 1992)	10
<u>Stone v. Powell</u> , 428 U.S. 465 (1976)	17
<u>Teague v. Lane</u> , 489 U.S. 288 (1989)	6
<u>Wright v. West</u> , 112 S. Ct. 2482 (1992)	15
<u>Younger v. Harris</u> , 401 U.S. 37 (1971)	14

STATUTES

21 U.S.C. §848(q)(4)(B)	3, 5, 8, 11, 12, 13, 22, 24
28 U.S.C. § 848(q)(4)(B)	10

28 U.S.C. § 1254	2
28 U.S.C. §§ 1291(a) & 2253	2
28 U.S.C. §§ 1331, 1366, 1651(a), 2241 & 2251	2
28 U.S.C. § 1651(a)	2, 3, 13
28 U.S.C. §2251	2, 3, 9, 11, 13, 15
28 U.S.C. § 2254	23
28 U.S.C. § 2283	3, 14

MISC.

Brian L. McDermott, Comment, Defending the Defenseless, 75 Iowa L. Rev. 1305 (1990)	21
Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199 (1971)	23
Donald Zeitham, Note, Constitutional Right to State Capital Collateral Review: The Due Process of Executing a Convict Without Attorney Representation, 80 J. Crim. L. & Criminology 1190 (1990)	21
James S. Liebman, Federal Habeas Corpus Practice and Procedure, § 7.2, at 37 (1991 Supp.)	20, 24

IN THE SUPREME COURT
OF THE UNITED STATES

No. _____

FRANK BASIL MCFARLAND

Petitioner,

-v-

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, FRANK BASIL MCFARLAND, respectfully requests that the Court grant Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the order of the federal district court dismissing Petitioner's *pro se* application for a stay of execution and appointment of counsel for want of jurisdiction. See McFarland v. Collins, ___ F.3d ___ (5th Cir. October 26, 1993). A copy of the Fifth Circuit's opinion is attached as Appendix A [The court's opinion will be forwarded as soon as it becomes available].¹ A copy of the district court's order is attached as Appendix B.

JURISDICTION

On October 26, 1993, the Court of Appeals affirmed the district court's dismissal of Petitioner's *pro se* motion for a stay of execution and appointment of counsel. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254. Jurisdiction in the district court existed under 28 U.S.C. §§ 1331, 1366, 1651(a), 2241 & 2251. In the Court of Appeals, jurisdiction was invoked pursuant to 28 U.S.C. §§ 1291(a) & 2253.

¹ As of the time that this petition is being lodged with this Court, the Court of Appeals has not yet issued an order in this case. In order to avoid a frantic last-minute preparation and filing of a certiorari petition -- assuming that the Court of Appeals denies relief -- Petitioner lodges this petition contingently. Petitioner reserves the right to supplement or amend this contingent petition in view of the Court of Appeals' ultimate holding.

CONSTITUTIONAL PROVISIONS INVOLVED

The jurisdictional issues in the case concern four federal statutes: The habeas corpus jurisdictional statute, 28 U.S.C. § 2251; The All Writs Act, 28 U.S.C. § 1651(a); the Anti-Injunction Act, 28 U.S.C. § 2283; the provision in the Criminal Justice Act requiring the appointment of federal habeas counsel, 21 U.S.C. § 848(q)(4)(B). Those four statutes are set forth in Appendix C attached hereto.

This case also implicates Petitioner's federal constitutional rights under the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, which read, in pertinent part, as follows:

Amendment VIII

"... [N]or [shall] cruel and unusual punishments [be] inflicted."

Amendment XIV

"... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

This case also involves the Habeas Corpus Suspension Clause, Art. I, § 9, Cl. 2, which provides:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

STATEMENT OF THE CASE

I. Procedural and Factual Background

In view of obvious time constraints, Petitioner will forego an extended discussion of the procedural and factual background of this case. The prior proceedings in state court are fully discussed in Petitioner's petition for writ of certiorari filed in this Court yesterday. See McFarland v. Texas, Petition for Writ of Certiorari, No. ____ (filed October 25, 1993). The prior proceedings in federal court are fully discussed in Petitioner's *Brief in Support of Application for Certificate of Probable Cause and Motion for Stay of Execution*, which was filed in the Court of Appeals this morning. A copy of that brief has been faxed to this Court. Accordingly, Petitioner will simply summarize the holdings of the U.S. District Court and Court of Appeals.

The district court, adopting the State's position, held that it had no jurisdiction over the case -- either to enter a stay or appoint counsel under § 848(q)(4)(B) -- because no federal habeas corpus "petition" had been filed by Petitioner. Rejecting the Ninth Circuit's analysis in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied, ____ U.S. ____ (1992), the district court held that it had no authority to appoint counsel pursuant to § 848(q)(4)(B) or stay Petitioner's execution because no "post-conviction proceeding under [28 U.S.C.] section 2254" was instituted by the filing of a habeas corpus "petition." McFarland v. Collins, *supra*, slip op., at 2. The United States Court of Appeals affirmed the judgment of the district court. See McFarland

v. Collins, ___ F.3d ___ (5th Cir. October 26, 1993) [That opinion will be forwarded to this Court as soon as it is made available.]

II. How the Issues Were Raised and Decided Below

Petitioner filed a *pro se* motion to stay his execution in the federal district court, also requesting that the court appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B). Citing Justice Kennedy's concurrence in Murray v. Giarattano, 109 S. Ct. 2765, 2772-73 (1989), Petitioner also contended that the federal Constitution required the appointment of counsel and a stay of execution so that such counsel could adequately prepare Petitioner's habeas appeal. For authority that the district court could stay Petitioner's execution, notwithstanding the fact that a habeas petition had not yet been filed, Petitioner cited the Ninth Circuit's decision in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied ___ U.S. ___ (1992).

The district court dismissed the *pro se* motion, holding that the court lacked jurisdiction to enter a stay and appoint counsel since no habeas corpus "petition" had been filed. See McFarland v. Collins, No. 4:93-CV-714-A (N.D. Tex. October 25, 1993). The United States Court of Appeals for the Fifth Circuit affirmed, denying a stay of execution. See McFarland v. Collins, ___ F.3d ___ (5th Cir. October 26, 1993).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

I. IN VIEW OF THE NINTH CIRCUIT'S DECISION IN BROWN V. VASQUEZ, PETITIONER WAS NECESSARILY ENTITLED TO A CERTIFICATE OF PROBABLE CAUSE TO APPEAL.

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983), sets forth the standard by which federal habeas courts must judge Petitioner's Application for Certificate for Probable Cause (CPC): A CPC must be granted if reasonable jurists can differ on the issue. Because the lower courts have taken a position diametrically contrary to the Ninth Circuit, a CPC and stay of execution should be automatic. Compare McFarland v. Collins, No. 4:93-CV-714-A (N.D. Tex. October 25, 1993), aff'd ___ F.2d ___ (5th Cir. October 26, 1993), with Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied, ___ U.S. ___ (1992).

In support of this argument, Petitioner cites, by analogy, this Court's retroactivity doctrine in Teague v. Lane, 489 U.S. 288 (1989), and this Court's qualified immunity doctrine, which both embody the same "reasonable person's view of the prevailing law" standard in other contexts.² If a federal habeas court had before it an issue of first impression in the Circuit in a case involving

² In the Teague context, this central inquiry is whether the decision of a state court at the time that a criminal defendant's conviction became final was a "reasonable, good faith" interpretation of existing law. See Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993) (citing cases). Likewise, in the qualified immunity context, the central inquiry is whether executive officials acted in an "objectively reasonable" manner at the time of the alleged constitutional violation in view of the "clearly established law." See, e.g., Anderson v. Creighton, 483 U.S. 635, 638-39 (1987) (citing cases).

the Teague doctrine, and there existed a decision of another federal circuit squarely on point rejecting the constitutional claim on the merits, the court would undoubtedly conclude that the federal habeas petitioner would be barred under Teague from raising the claim because "reasonable jurists" could differ (and indeed had differed) at the time that the defendant's conviction became final.

Similarly, in a qualified immunity case, if, at the time an executive official committed the alleged constitutional violation, there existed a decision from another federal circuit rejecting the precise constitutional claim made by a civil rights plaintiff, this Court would hold that claim was barred under the qualified immunity doctrine.

The same considerations apply in the context of an application for a certificate of probable cause. Indeed, such considerations apply *a fortiori* in cases such as the present one, since unlike cases involving Teague and qualified immunity, a court reviewing an application for CPC is faced with a necessarily quick decision under serious time constraints -- i.e., a pending execution date. In such a case, a federal habeas court cannot possibly undertake adequate research and engage in thoughtful deliberations over such a complex issue in such a short time. In this regard, the fact that at least one other federal circuit has adopted the position taken by Petitioner strongly militates in favor of granting CPC and a stay for the purpose of affording adequate time to deliberate over this issue. Thus, because the Ninth Circuit's decision in Brown v. Vasquez *ipso facto* establishes that reasonable jurists can

differ on this issue, a CPC and stay should have been granted as a matter of course.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT IN THE CIRCUITS OVER WHETHER A FEDERAL HABEAS COURT CAN APPOINT AN INDIGENT INMATE COUNSEL UNDER 21 U.S.C. § 848(q)(4)(B), NOTWITHSTANDING THE FACT THAT THE INMATE HAS NOT FIRST FILED A HABEAS CORPUS "PETITION."

A. The lower courts' refusal to stay Petitioner's execution and appoint counsel is in direct conflict with the interpretation of the federal habeas statutory scheme by the Ninth Circuit in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991).

Because an indigent state prisoner seeking to vacate a death sentence in "any post conviction proceeding under section 2254 ... of Title 28" is "entitled" to the appointment of one or more attorneys to represent him, 21 U.S.C. § 848(q)(4)(B), the district court erred by refusing to stay Petitioner's execution "in order to appoint counsel to assist [him] in preparing and filing a petition for federal habeas corpus relief." Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991). The Ninth Circuit in Brown v. Vasquez was faced with a situation quite similar to the instant case -- an indigent *pro se* state inmate under a sentence of death who was unable by himself to prepare a federal habeas petition and who requested a stay of execution so that a federal district court could appoint counsel. At issue was whether the district court had jurisdiction to grant the stay and appoint counsel when a habeas "petition" had not yet been filed. The Ninth Circuit held that a federal habeas corpus court does have jurisdiction to enter a stay -- for the purpose of appointing counsel under § 848(q)(4)(b) -- even though

no habeas "petition" is filed first. See Brown, 952 F.2d at 1166-69.³

Rejecting the state's argument that 28 U.S.C. § 2251 afforded a federal habeas corpus court no jurisdiction to enter a stay unless a habeas corpus "petition" was filed, the Brown court held that the Great Writ must be "'administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected.'" Brown, 952 F.2d at 1166 (quoting Harris v. Nelson, 394 U.S. 286, 290-91 (1969)). As the court reasoned:

If a district court can appoint counsel to represent a death penalty habeas petitioner, surely it can issue a stay of execution when necessary to make the appointment and allow appointed counsel reasonable time to do his job. Otherwise, the petitioner could be executed before appointed counsel could be found or before that counsel could undertake the task for which he was appointed. The habeas process need not tolerate the possibility of such a perverse absurdity."

Brown, 952 F.2d at 1169. The Ninth Circuit further stated that:

the underlying purpose of the writ of habeas corpus requires us to view the application for the appointment of counsel to assist in the preparation of a death penalty prisoner's habeas corpus petition as an integral part of the habeas corpus process under [the federal habeas corpus statutes].

Id. In reaching this decision, the court also took into account the tremendous obligations of habeas counsel in a death penalty case:

³ It should be noted that the instant case presents an even more compelling situation than Brown. In Brown, the pro se federal habeas petitioner had been represented by counsel in his state habeas appeals. See Brown, 952 F.2d at 1164. Petitioner, conversely, has had no representation in any post-conviction proceedings, state or federal.

[A] prisoner applying for habeas corpus relief in federal court must assert all possible violations of his constitutional rights in his initial application or run the risk of losing what might be a viable claim. This is a substantial burden. Compounding this burden, the petitioner is often illiterate or poorly educated and yet must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated. Such a task is "difficult even for a trained lawyer to master," and, understandable, is often beyond the abilities of most prisoners. Murray v. Giarrantano, 492 U.S. 1, 28, 109 S.Ct. 2765, 2780, 106 L.Ed.2d 1 (1989) (Stevens, J., dissenting).

952 F.2d at 1167.⁴

The district court in the present case erred by failing to reach the same conclusion. The district court instead relied on the Eleventh Circuit's decision in In re Lindsey, 875 F.2d 1502 (11th Cir. 1989). Although that particular case is inapposite to the issue presented here,⁵ Petitioner recognizes that another decision by the Eleventh Circuit in the same litigation did hold --

⁴ The Ninth Circuit is not alone in this position. See also Mooney v. Collins, No. 6:92CV254, slip op. at 2 (E.D. Tex. April 30, 1992) (quoting Brown v. Vasquez, 952 F.2d at 1165); Steffen v. Tate, No. C-1-92-495, slip op., 3-4 (S.D. Ohio June 18, 1992) ("The Court is faced with the imminent prospect that unless it acts promptly to grant petitioner's request, [for a stay] petitioner will be executed without ever obtaining federal review of his constitutional claims. The Court strongly believes that petitioner is entitled to such review, and nothing in McCleskey or any other decisions of the United States Supreme Court is to the contrary.").

⁵ In that case, the court held that 28 U.S.C. § 848(q)(4)(B) did not require the appointment of federal habeas counsel for the preparation of claims that had not yet been exhausted in the state courts. That is, the court held that federal monies should not be expended for state court litigation in capital habeas cases. See 875 F.2d at 1504-06. That case thus does not hold that § 848 does not require the appointment of federal habeas counsel until a federal habeas petition is formally filed. Rather, Lindsey's holding is rooted in the habeas corpus "exhaustion" doctrine, which is not at issue in the present case.

after offering only a scant analysis, unlike the Ninth Circuit's thorough analysis of the issue -- that a federal habeas court has no jurisdiction to enter a stay and appoint counsel under 21 U.S.C. § 848(q)(4)(B) unless a habeas corpus "petition" is first filed. See In re Lindsey, 875 F.2d 1518, 1519 (11th Cir. 1989).⁶ Petitioner contends that the Eleventh Circuit's position is erroneous and that the Ninth Circuit's position is the correct one for the reasons stated in Brown v. Vasquez, *supra*.

Thus, in the instant case, the district court had jurisdiction under 28 U.S.C. § 2251 to enter a stay pending the obligatory appointment of federal habeas counsel pursuant to 21 U.S.C. § 848(q)(4)(B). This Court should grant certiorari in order to resolve the division among the lower federal courts on this important issue regarding the administration of federal habeas corpus.

B. 21 U.S.C. § 848(q)(4)(B) requires federal habeas courts to appoint indigent state court capital defendants counsel on habeas corpus review; a stay of execution should be granted as a necessary concomitant.

21 U.S.C. § 848(q)(4)(B), a part of the Criminal Justice Act, required the district court to stay Petitioner's imminent execution and appoint permanent habeas counsel. The plain language of that statute unequivocally required the district court to appoint Petitioner, who is an indigent, post-conviction counsel who can undertake genuine representation of Petitioner's case. See *id.*

⁶ That case was not cited by the federal district court.

("In any post conviction proceeding under section 2254 . . . of Title 28, seeking to vacate or set aside a death sentence, any defendant who is . . . financially unable to obtain adequate [legal] representation . . . or other reasonably necessary services shall be entitled to the appointment of one or more attorneys . . . ") (emphasis added). Although the legislative history of § 848(q)(4)(B) is largely non-existent,⁷ there is no indication that Congress intended the appointment of habeas counsel for indigents to be discretionary.

Furthermore, common sense supports Petitioner's arguments: One must ask how, if Congress intended the district court to appoint him permanent counsel so that he may challenge his state court death sentence on federal constitutional grounds, can Petitioner meaningfully do so if he is put to death before his counsel has an opportunity do anything on his behalf because no court will stay his imminent execution? Cf. Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir. 1991), *cert. denied*, ___ U.S. ___ (1992).

⁷ There is no legislative report of any type, nor does there appear to be any meaningful debate on the floor of either House of Congress regarding this provision. See Pub. L. No. 100-690, 1988 U.S. CODE & CONG. AND ADMIN. NEWS, p. 5937. Interestingly, a subsequent bill offered in the Senate by various Republican Senators attempted to amend this provision in order to afford discretion to federal judges in the appointment of counsel for post-conviction habeas appeals of state court capital defendants. See 135 CONG. RECORD (Senate) S7260, S7264, S7273. The language of the proposed statute provided that: "In a proceeding under section 2254 of Title 28, United States Code, relating to a state capital case, or any subsequent proceeding on review, appointment for a petitioner who is or becomes financially unable to afford counsel shall be in the discretion of the court. . ." (emphasis added). This proposed legislation never passed.

As another federal habeas court has observed regarding 21 U.S.C.

848(q)(4)(B):

There is no dispute that as a result of [McCleskey v. Zant, 111 S. Ct. 1454 (1991)],¹ it is now "reasonably necessary" for [federal habeas] counsel [appointed under this statute] to investigate and present all claims in the first [federal habeas] petition. McCleskey made clear that attorneys must raise all claims, not merely those claims known to the petitioner at the time of filing [a habeas petition], but also those claims that a reasonable investigation would have revealed. Faced with this obligation, an attorney must review the record, conduct a preliminary factual investigation, and ensure that all claims for relief have been uncovered and evaluated.

Coleman v. Vasquez, 771 F. Supp. 300, 302 (N.D. Cal. 1991) (emphasis added).²

In this case, there has been absolutely nothing but a last-minute cursory review of the record by a single Texas Resource Center attorney and no post-conviction factual investigation by anyone. Because the Texas courts have refused to stay Petitioner's imminent execution and appoint state habeas counsel to raise federal constitutional claims not exhausted on direct appeal, the federal habeas courts have no choice but to stay Petitioner's execution in order to carry out the obvious purpose of 21 U.S.C. § 848(q)(4)(B).

¹ In McCleskey, this Court effectively restricted state court defendants to a single federal habeas appeal in the vast majority of cases.

² It is noteworthy, however, that the Fifth Circuit has suggested that a court-appointed habeas attorney must be given sufficient time to prepare a case. See Duff-Smith v. Collins, 973 F.2d 1175, 1179-80 (5th Cir. 1992).

C. The All Writs Act provided the district court with authority to enter a stay of execution so that habeas counsel could be appointed.

Assuming *arguendo* that the district court did not possess jurisdiction under either 28 U.S.C. § 2251 or 21 U.S.C. § 848(q)(4)(B), the district court nevertheless had jurisdiction to stay Petitioner's execution under the All Writs Act, 28 U.S.C. 1651(a). That statute provides that, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." That jurisdictional statute permits a federal court to issue a stay or injunction even before jurisdiction formally vests in the court in order to preserve jurisdiction. See ITT Community Develop. Corp. v. Barton, 569 F.2d 1351, 1359 n.19 (5th Cir. 1978). As the court stated in ITT, "[a] federal court has the power under the All Writs Act to issue injunctive orders in a case even before the court's jurisdiction has been established. When potential jurisdiction exists, a federal court may issue status quo orders to ensure that once its jurisdiction is shown to exist, the court will be in a position to exercise it." *Id.*; see also Merrimack River Savings Bank, 219 U.S. 527, 534 (1911) (injunction is always appropriate simply to preserve the status quo or subject matter of a case). In Brown v. Vasquez, *supra*, the federal district court stayed the *pro se* capital habeas petitioner's execution under the All Writs Act. See Brown v. Vasquez, 743 F. Supp. 729, 732 (C.D. Cal. 1990), *aff'd*

on other grounds, 952 F.2d 1164 (9th Cir. 1991), cert. denied, ___ U.S. ___ (1992).

In Brown, the state argued that the All Writs Act was inapplicable to a capital habeas petitioner's *pro se* motion seeking a stay of execution and appointment of counsel in view of the Anti-Injunction Act, 28 U.S.C. § 2283, which provides that, as a general rule, federal courts should not stay state proceedings. However, there are three statutory exceptions contained in § 2283: (i) when there are other congressional statutes that permit injunctions or stays of state court proceedings, (ii) "where [stays are] necessary in aid of [a federal court's jurisdiction," and (iii) when stays are necessary "to protect or effectuate [federal] judgments." See Younger v. Harris, 401 U.S. 37, 43 (1971). The second exception is obviously relevant to the instant case, in that it essentially adopts the All Writs Act. See Atlantic Coast Line R.R. Co. v. Brotherhood of Local Eng., 398 U.S. 281, 294-95 (1970). In Atlantic Coast Line, this Court, in construing the second exception, held that "some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration and disposition of a cases as to seriously impair the federal court's flexibility and authority to decide that case." Id. at 295; see also Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291, 306 (5th Cir. 1979).

D. As a matter of equity and fairness, this Court should stay Petitioner's imminent execution so that he may, with the assistance of counsel, meaningfully exercise his statutory right to file a federal habeas corpus petition.

Petitioner asks this Court, in ruling on his various statutory claims, to consider the larger equities at issue here. See Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (habeas corpus "traditionally been regarded as governed by equitable principles"). A first-time capital habeas petitioner does not merit such expedited treatment, particularly when he has not actually been represented by an attorney. As this Court recently held, federal habeas corpus -- at least regarding a petitioner's initial appeal -- is alive and well. See Wright v. West, 112 S. Ct. 2482 (1992). This is not a case where a federal habeas petitioner has abused the habeas process or otherwise acted in a dilatory manner. Indeed, Petitioner's direct appeal certiorari petition was denied by this Court in June of this year.¹⁰

III. ASSUMING ARGUENDO THAT THE LOWER COURTS LACKED A STATUTORY BASIS OF JURISDICTION TO STAY PETITIONER'S EXECUTION, VARIOUS CONSTITUTIONAL GUARANTEES REQUIRED THE COURTS TO STAY PETITIONER'S EXECUTION SO THAT COUNSEL COULD BE OBTAINED.

The next set of claims raised by Petitioner assume *arguendo* that the district court lacked a statutory basis of jurisdiction under 28 U.S.C. § 2251 and, moreover, that the Anti-Injunction Act

¹⁰ Even critics of the previously slow pace of capital habeas corpus proceedings have never suggested that such expedited habeas procedures are appropriate. See, *e.g.*, Judge Edith H. Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 Tex. B. J. 850, 851-52 (1990).

operated in a manner so as to prevent the district court from granting a stay pursuant to the All Writs Act.

Even if that were the case, the lower courts' refusal to stay Petitioner's imminent execution, so that counsel could be recruited or appointed, violated a number of different constitutional provisions. Because the Anti-Injunction Act would be the linchpin of any refusal to find jurisdiction -- assuming that the district court lacked a statutory basis to stay Petitioner's execution¹¹ -- this Court must ask whether the Anti-Injunction Act could ever operate in an unconstitutional manner.

In the case of an indigent *pro se* state-court inmate under the sentence of death who seeks to challenge his conviction and sentence in a federal post-conviction proceeding, the Constitution requires that a federal court temporarily stay his execution until counsel can be obtained so that the inmate's federal right to a habeas corpus appeal may be pursued in a meaningful fashion. See generally Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW*, § 3-5, 42-61 (2d ed. 1988) (discussing this Court's jurisprudence regarding the question of whether a congressional statute can unconstitutionally deprive federal courts jurisdiction over a particular case or controversy). In particular, as discussed *infra*, the federal constitutional right to "access to the courts" and the constitutional proscription against the suspension of habeas corpus

¹¹ That is, unquestionably the All Writs Act or a federal court's inherent authority to issue an injunction or stay to preserve the subject matter of a case would supply the basis for staying Petitioner's execution but for the Anti-Injunction Act.

take precedence over the operation of a federal jurisdictional statute such as the Anti-Injunction Act.

One other point should be made here. Although Petitioner is specifically attacking the constitutionality of an action by a federal habeas court, the larger constitutional issues implicated here -- the right to meaningful access to habeas counsel and a meaningful post-conviction review -- concern the actions of both the state and federal habeas courts. See Murray v. Giarratano, 109 S. Ct. 2765, 2773 (1989) (Kennedy, J., concurring joined by O'Connor, J.) (although § 1983 action attacked constitutionality of state's denial of habeas counsel, concurring opinion discussed role of "Congress and state legislatures" in providing counsel). Indeed, of any judicial action, a habeas corpus action attacking a state court criminal conviction integrally involves both the state and federal courts. This Court's modern habeas corpus jurisprudence underscores the intimate relationship between state and federal habeas courts. See, e.g., Rose v. Lundy, 455 U.S. 509 (1982) (federal habeas "exhaustion" doctrine); Stone v. Powell, 428 U.S. 465 (1976) (Fourth Amendment claim cannot be raised on federal habeas review if "full and fair" opportunity to litigate the claim in state court). Thus, in evaluating Petitioner's claims here, this Court should consider the actions of the Texas habeas courts in the instant case.

A. The refusal of the state courts and the lower federal courts to stay Petitioner's execution and appoint counsel violated Petitioner's federal constitutional right of access to the courts.

In Murray v. Giarrratano, 109 S. Ct. 2765 (1989), six Members of this Court recognized that the federal constitutional right of "access to the courts" could, in a given case, require habeas courts to appoint an indigent capital defendant counsel to pursue post-conviction habeas appeals. See id. at 2772 (O'Connor, J., concurring); id. at 2772-73 (Kennedy, J., concurring, joined by O'Connor, J.); id. at 2773-75 (Stevens, J., dissenting, joined by Brennan, Marshall & Blackmun, JJ.); but see id. at 2771-72 (plurality). The concurrences of Justice O'Connor and Kennedy -- which recognized that at least in some capital habeas cases petitioners may have a constitutional right to habeas counsel as a part of the larger constitutional right of "access to the courts" -- must be treated as the "holding" of the Court, rather than the contrary position of the plurality.¹²

In Giarrratano, Justices O'Connor and Kennedy believed that the Supreme Court's seminal "right to counsel" case, Bounds v. Smith, 430 U.S. 817 (1977), might require the appointment of counsel for an indigent capital habeas petitioner. See Giarrratano, 109 S. Ct.

¹² The established rule in this Court is that where no single rationale supporting the result commands a majority of the Court, "the ["]holding["] of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (joint opinion)); see also City of Lakewood v. Plain Dealer, 486 U.S. 750, 765-66 n.9 (1988) (same).

at 2272-73 (Kennedy, J., concurring, joined by O'Connor, J.). In Bounds, the Court held "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance by persons trained in law." Bounds, 430 U.S. at 828.

In the proceedings below in the instant case, Petitioner, an indigent *pro se* habeas petitioner under sentence of death, was unable to utilize the law library provided to him by the Texas Department of Criminal Justice because of a lack of education and training. Nor did the state executive or legislative branches, the state courts, or the lower federal courts provide Petitioner with any type of legal assistance in this case so as to enable him to benefit from access to the law library.¹³ See, e.g., Ex Parte McFarland, Motion to Stay Execution Date to Allow Defendant to Obtain an Attorney to Prepare and File a Post-Conviction Application for Writ of Habeas Corpus, at 2 (filed in Texas Court of Criminal Appeals on October 21, 1993). Finally, the assistance of inmate "writ writers" was not a viable means of affording

¹³ Although the Texas Department of Justice, Institutional Division (formerly the "Texas Department of Corrections") in prior years provided limited assistance from staff counsel for unrepresented inmates on Texas' death row who wished to file habeas corpus appeals, the State has discontinued providing such services for new inmates since the late 1980s, although staff counsel have continued to represent a small number of inmates whose representation began in prior years. Petitioner is not among those few inmates. The State's refusal to provide death row inmates further assistance from staff counsel in habeas appeals beginning in the late 1980s coincided with the creation of the Texas Resource Center in 1988.

Petitioner access to the courts, cf. Johnson v. Avery, 393 U.S. 483 (1969), as Texas proscribes the practice of law except by licensed attorneys. See TEXAS GOV'T CODE § 81.102 (1993); id. § 81.101(a) (defining "practice of law" as including "preparation of a pleading or other document incident to a[] [legal] action"); see also Grievance Comm. of State Bar v. Dean, 190 S.W.2d 126 (Tex.Civ.App. 1945). The only way to have provided Petitioner meaningful access to the courts was either to appoint counsel, or at the very least, stay his execution for a reasonable amount of time, so that Petitioner himself, with the assistance of the Texas Resource Center, could obtain *pro bono* counsel. Because the state courts and lower federal courts did neither of these things, Petitioner's federal constitutional right of access to the courts to pursue a post-conviction appeal was violated.

B. Petitioner's federal constitutional right to habeas counsel was violated by the state courts and the lower federal courts.

Although a plurality of this Court in Murray v. Giarratano, 109 S. Ct. 2765 (1989), held that there was no constitutional right to habeas counsel in capital cases under any circumstances,¹⁴ a majority of the Court has never squarely decided that question. Notably, in his concurrence, Justice Kennedy, joined by Justice O'Connor, stated that "no prisoner on death row in Virginia has

¹⁴ Like Justice O'Connor's concurrence in Giarratano, Petitioner distinguishes between the constitutional right to counsel *per se* in habeas cases and the distinct constitutional right of "access to the courts." See Giarratano, 109 S. Ct. at 2772 (O'Connor, J., concurring).

been unable to obtain counsel to represent him in postconviction proceedings . . . I am not prepared to say that this scheme violates the Constitution. On the facts of this case, I concur in the judgment of the Court." Giarratano, 109 S. Ct. at 2773 (emphasis added).

Because the four Justices who dissented in Giarratano contended that there was a federal constitutional right to counsel for indigent death row inmates in post-conviction proceedings, see id. at 2773 (Stevens, J., dissenting, joined by Brennan, Marshall & Blackmun, JJ.), a total of six Members of the Court in Giarratano believed that, at least in some cases, a death row inmate has a constitutional right to habeas counsel. In terms of precedential value, Justice Kennedy's concurrence, rather than the plurality's opinion, must be treated as the opinion of the Court. See Marks v. United States, supra.¹⁵ It is also notable that the plurality opinion in Giarratano has been widely criticized by commentators.¹⁶

¹⁵ How Justice O'Connor voted in Giarratano is somewhat unclear. Although she joined the plurality opinion, she also separately concurred and additionally joined in Justice Kennedy's separate concurring opinion. See Giarratano, 109 S. Ct. at 2772 (O'Connor, J., concurring); id. 2772-73 (O'Connor, J., joining opinion of Kennedy, J., concurring). In view of the Supreme Court's well-established rule that the pivotal concurrence on the narrowest grounds is to be treated as the "holding" of the Court in a case where no single rationale commands a majority of the Court, presumably Justice O'Connor's joining Justice Kennedy's concurring opinion represents Justice O'Connor's vote in Giarratano.

¹⁶ See, e.g., James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 7.2, at 37 (1991 Supp.); Scott E. Rogers, Note, Constitutional Law/Access to the Courts--Limiting the Relief Available to Death Row Inmates Denied Meaningful Access to the Courts, 17 FLA. ST. L. REV. 399 (1990); Alice McGill, Comment, Murray v. Giarratano: Right to Counsel in Postconviction

The instant case is clearly distinguishable from the facts in Giarratano. As discussed at length in Petitioner's various *pro se* motions filed in the state and federal habeas courts -- including the letters from the Texas Resource Center to the lower courts attached thereto, which are part of the record -- indigent capital defense in Texas is in a state of crisis.¹⁷ Unlike the situation in Virginia in the mid to late 1980s, current conditions in Texas have resulted in numerous death row inmates, such as Petitioner, being "unable to obtain counsel to represent [them] in postconviction proceedings." Giarratano, 109 S. Ct. at 2773 (Kennedy, J., concurring, joined by O'Connor, J.).

As the record reveals, there are approximately seventy inmates on Texas' death row who are in the post-conviction phase and who are unrepresented by habeas counsel. A significant number of those unrepresented inmates, including Petitioner, have active execution dates. Although state habeas trial courts in Texas apparently have the discretion to appoint indigent inmates habeas counsel under a state statute,¹⁸ it is beyond dispute that such discretionary

Proceedings in Death Penalty Cases, 18 HAST. CONST. L.Q. 211 (1990); Brian L. McDermott, Comment, *Defending the Defenseless*, 75 IOWA L. REV. 1305 (1990); Geraldine S. Moohr, Note, Murray v. Giarratano: A Remedy Render a Meaningless Ritual, 39 AMER. U. L. REV. 765 (1990); Donald Zeitham, Note, *Constitutional Right to State Capital Collateral Review: The Due Process of Executing a Convict Without Attorney Representation*, 80 J. CRIM. L. & CRIMINOLOGY 1190 (1990).

¹⁷ Notably, neither the state courts, the federal district court, nor the State has disputed any of Petitioner's factual allegations regarding the crisis in indigent defense in Texas capital habeas cases.

¹⁸ See TEX. CODE CRIM. PRO. ARTS. 26.04 & 26.05 (Vernon 1993).

21 U.S.C. §848(q)(4)(B)

In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

28 U.S.C. §1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. §2251

A justice or judge of the United States before whom a habeas corpus proceeding is pending may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

28 U.S.C. §2283

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

APPENDIX A

23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to October 27, 1993. On October 22, 1993, McFarland filed the motions presently before the court.

Pursuant to 21 U.S.C. § 848 (g)(4)(B) a defendant in any post-conviction proceeding under 28 U.S.C. § 2254 or § 2255 who is or becomes financially unable to obtain adequate representation is entitled to the appointment of one or more attorneys. In the instant case, however, McFarland is not entitled to such an appointment because there is not "a post-conviction proceeding under section 2254 or 2255 of Title 28" pending. Only when McFarland files such a petition (in compliance with applicable federal and local rules) will the court have authority to grant the motions, if appropriate. In Re Lindsey, 875 F.2d 1502, 1504 (11th Cir. 1989). Moreover, because there is not a pending habeas corpus proceeding, the court has no jurisdiction to enter a stay of execution or grant in forma pauperis status. Narvaiz v. Collins, No. SA4-93-CA-0311 (W. D. Tex. April 21, 1993). McFarland has not provided the court with the "information and materials necessary to make a careful assessment of the merits" to determine whether a stay is warranted. Barefoot v. Estelle, 463 U.S. 880, 896 (1983). Therefore,

The court ORDERS that the motions of McFarland (i) for stay

of execution and request for appointment of counsel and (ii) for leave to proceed in forma pauperis be, and are hereby denied.

SIGNED October 25, 1993.

JOHN MCBRYDE
United States District Judge

OCT 26 1993

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1954

CHARLES R. FULBRUGE III
CLERK

FRANK BASIL MCFARLAND,

Petitioner,

VERSUS

JAMES A. COLLINS,
Director, Texas Department of Criminal Justice,
Institution Division,

Respondent.

ON MOTION FOR STAY OF EXECUTION AND APPOINTMENT OF COUNSEL

Before DAVIS, JONES, and DUHE, Circuit Judges.

PER CURIAM:

Frank B. McFarland seeks in forma pauperis status and a certificate of probable cause to review the district court's denial of his application for a stay of execution and for the appointment of counsel to represent him in the filing and prosecution of a complaint for habeas relief. He also seeks from this Court a stay of execution.

We grant IFP but deny certificate of probable cause.

The only post conviction relief petitioner has sought in state court has been a number of motions to stay court ordered executions to permit the petitioner to obtain habeas counsel. The final motion for stay was denied by the Texas Court of Criminal Appeals on October 22. Thus, no post-conviction claims have been filed in state court alleging specific constitutional infirmities in his state court conviction and sentence. The only pleadings McFarland

has filed in federal district court is a motion for stay of the state court ordered execution and request for appointment of counsel and a request for certificate of probable cause. McFarland seeks review of the district court's denial of those motions.

A Petitioner does not have a right to an automatic stay pending the filing of his first habeas corpus petition. Autry v. Estelle, 464 U.S. 1, 2 (1983). A United States Court may not stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to perfect or effectuate its judgments. 28 U.S.C. § 2283. Such an act of Congress exists in the form of 28 U.S.C. § 2251, but it authorizes stay only by a court before which a habeas corpus proceeding is pending. No habeas corpus proceeding was pending before the district court and none is pending here. A suit is pending when commenced. In Re Connaway, 178 U.S. 421, 427-28 (1900). Federal Rule of Civil Procedure 3 makes it clear one commences a civil proceeding by filing a complaint with the court. That has not been done. We do not view the motion for stay and for appointment of counsel as the equivalent of an application for habeas relief. Brown v. Vasquez, 952 F.2d 1164, 1166 (9th Cir. 1991), cert. denied, 112 S.Ct. 1778 (1992). We do not, however, share the view of the Ninth Circuit in Brown that the filing of the motions at issue is sufficient to meet the requirement of § 2251 that a habeas proceeding be "pending" before we may stay state court proceedings. Brown, 952 F.2d at 1169. In fact, all of the "pro se" filings in this matter, which were prepared by the Texas

Resource Center, show clearly that no habeas action is pending in any court.

Were we, by some legal alchemy, to ignore the foregoing, Appellant still could not prevail. He does not make the minimal showing necessary to establish entitlement to a stay. Appellant argues that he is entitled to appointment of counsel, and appointed counsel will require additional time to prepare the habeas petition. There is, however, no constitutional right to court appointed counsel in state post-conviction proceedings. Coleman v. Thompson, 111 S.Ct. 2546 (1991); Murray v. Giarattano, 492 U.S. 1 (1989). We are not prepared to accept the blanket assertion that, in this case, meaningful access to the courts necessarily means court appointed counsel. Id.

Additionally, to be entitled to a stay, Appellant must show, if not a probability of success on the merits, at least a substantial case on the merits when a serious legal question is involved. Byrne v. Roemer, 847 F.2d 1130, 1133 (5th Cir. 1988). Appellant has not even indicated the issues that might be raised in a habeas application, much less shown a substantial case on the merits. Barefoot v. Estelle, 463 U.S. 880, 895 (1983).¹

¹ There is yet another problem not addressed by any of Appellant's filings: the question of exhaustion of state remedies. Petitioner must exhaust state habeas remedies before he is entitled to relief on a federal habeas petition. 22 U.S.C. § 2254(b) (West 1985); In Re Lindsey, 875 F.2d 1502, 1506 (11th Cir. 1989). The numerous attachments to the papers filed show not only that no claims have been exhausted; but no post conviction claims have even been filed in state court. Thus, even if McFarland's pleadings are characterized as a federal habeas petition, the district court would be obliged to dismiss it for failure to exhaust the claims.

Accordingly the application for certificate of probable cause is denied. The motion for stay of execution and appointment of counsel is also denied.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

OCT 25 1993
NANCY DOHERTY, CLERK

FRANK BASIL MCFARLAND §
§
Petitioner, §
§
VS. § NO. 4:93-CV-714-A
§
JAMES A. COLLINS, DIRECTOR, §
TEXAS DEPARTMENT OF CRIMINAL §
JUSTICE, INSTITUTIONAL §
DIVISION §
§
Respondent. §

ORDER

Came on to be considered in the above styled and numbered action the motions of petitioner, Frank Basil McFarland ("McFarland"), (i) for stay of execution and request for appointment of counsel and (ii) for leave to proceed in forma pauperis. After having considered the motions and the response of respondent the court finds that the motions should be denied.

On November 15, 1989, McFarland was convicted of capital murder and sentenced to death in the Criminal District Court Number Three of Tarrant County, Texas, the Honorable Don Leonard presiding. McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992). On June 6, 1993, McFarland's petition for writ of certiorari to the United States Supreme Court was denied. McFarland was represented by counsel at each of the above mentioned stages. On August 16, 1993, Judge Leonard entered an order scheduling McFarland's execution for September

23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to October 27, 1993. On October 22, 1993, McFarland filed the motions presently before the court.

Pursuant to 21 U.S.C. § 848 (g)(4)(B) a defendant in any post-conviction proceeding under 28 U.S.C. § 2254 or § 2255 who is or becomes financially unable to obtain adequate representation is entitled to the appointment of one or more attorneys. In the instant case, however, McFarland is not entitled to such an appointment because there is not "a post-conviction proceeding under section 2254 or 2255 of Title 28" pending. Only when McFarland files such a petition (in compliance with applicable federal and local rules) will the court have authority to grant the motions, if appropriate. In Re Lindsey, 875 F.2d 1502, 1504 (11th Cir. 1989). Moreover, because there is not a pending habeas corpus proceeding, the court has no jurisdiction to enter a stay of execution or grant in forma pauperis status. Narvaiz v. Collins, No. SA4-93-CA-0311 (W. D. Tex. April 21, 1993). McFarland has not provided the court with the "information and materials necessary to make a careful assessment of the merits" to determine whether a stay is warranted. Barefoot v. Estelle, 463 U.S. 880, 896 (1983). Therefore,

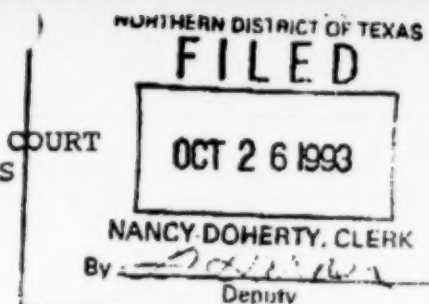
The court ORDERS that the motions of McFarland (i) for stay

of execution and request for appointment of counsel and (ii) for leave to proceed in forma pauperis be, and are hereby denied.

SIGNED October 25, 1993.

JOHN MCBRYDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



FRANK BASIL MCFARLAND,

Petitioner,

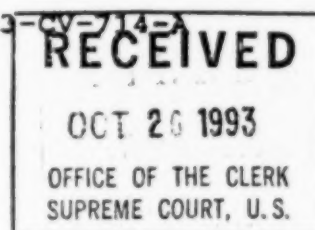
VS.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL
DIVISION

Respondent.

§
§
§
§
§
§
§
§
§
§

NO. 4:93-CV-714-A

ORDER

FRANK BASIL MCFARLAND, who has been designated "Petitioner" in the above numbered proceeding, has filed in such proceeding a document entitled "Pro Se Application for Certificate of Probable Cause to Authorize Appeal and Certification that Appeal is in Good Faith" (hereinafter "Application") and another document entitled "Motion for Leave to Proceed In Forma Pauperis on Appeal" (hereinafter "Motion"). The Application states that it is being made pursuant to 28 U.S.C. § 2253. Section 2253 applies only to "a habeas corpus proceeding before a circuit or district judge". The proceeding docketed as 4:93-CV-714-A on the docket of this court is not now, and has never been, a habeas corpus proceeding. This was made clear by the order signed by the court October 25, 1993. Thus, the Application should not have been filed in this proceeding. Therefore,

The court ORDERS that the Application be, and is hereby, stricken from the record of No. 4:93-CV-714-A.

For the reasons stated in the order signed by the court October 25, 1993, the Motion should be denied. Therefore, The court ORDERS that the Motion be, and is hereby, denied. THE COURT SO ORDERS.
SIGNED October 26, 1993.

[Signature]
JOHN MCBRYDE
United States District Judge

IN THE SUPREME COURT
OF THE UNITED STATES

No. 93 6497

3

Supreme Court, U.S.

FILED

OCT 26 1993

OFFICE OF THE CLERK

FRANK BASIL MCFARLAND

Petitioner,

-v-

**JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division,**

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner, **FRANK BASIL MCFARLAND**, submits the following supplement to his previously lodged (and subsequently filed) petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. As stated in the original petition, this supplement is necessary in view of the fact that the original petition was written before, albeit in anticipation of, a denial of relief by the Court of Appeals. The Court of Appeals opinion is attached hereto as **Appendix A**.

12 pp

**I. THE COURT OF APPEALS'S DECISION HAS
CREATED A SHARP CIRCUIT SPLIT THAT REQUIRES
THE IMMEDIATE ATTENTION OF THIS COURT .**

"If a district court can appoint counsel to represent a death penalty habeas petitioner, surely it can issue a stay of execution when necessary to make the appointment and allow appointed counsel reasonable time to do his job. Otherwise, the petitioner could be executed before appointed counsel could be found or before that counsel could undertake the task for which he was appointed. The habeas process need not tolerate the possibility of such a perverse absurdity."

Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir. 1991).

The Court of Appeals affirmed the order of the district court denying Petitioner a stay of execution and the obligatory appointment of counsel pursuant to 21 U.S.C. § 848(q)(4)(B). The Court of Appeals adopted the reasoning of the district court:

A United States Court may not stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to perfect or effectuate its judgments. 28 U.S.C. § 2283. Such an act of Congress exists in the form of 28 U.S.C. § 2251, but it authorizes stay only by a court before which a habeas corpus proceeding is pending. No habeas corpus proceeding was pending before the district court and none is pending here. . . . Federal Rule of Civil procedure 3 makes it clear one commences a civil proceeding by filing a complaint with the court. That has not been done. We not view the motion for stay and for appointment of counsel as the equivalent of an application for habeas relief. . . . We do not . . . share the view of the Ninth Circuit in [Brown v. Vasquez, 952 F.2d 1164, 1166 (9th Cir. 1991), cert. denied, 112 S. Ct. 1778 (1992),] that the filing of the motions at issue is sufficient to meet the requirement of § 2251 that a habeas proceeding be "pending" before we may stay state court proceedings.

McFarland v. Collins, ___ F.2d ___, No. 93-1954 (5th Cir. October 26, 1993) (per curiam) (emphasis added).

Thus, of three federal Circuits that have addressed the precise issue discussed by the Court of Appeals, the Fifth and Eleventh Circuit have held that a formal habeas "petition" must be filed in order to afford a federal habeas court with jurisdiction to stay an execution and the third, the Ninth Circuit, has held that a federal habeas court may stay an execution without such a formal filing in the case of an indigent *pro se* prospective habeas petitioner. See also In re Lindsey, 875 F.2d 1518, 1519 (11th Cir. 1989) (requiring the filing of a formal habeas "petition"). In addition, at least two federal district court decisions are in accord with the Ninth Circuit. See Mooney v. Collins, No. 6:92CV254, unpublished slip op. at 2 (E.D. Tex. April 30, 1992) (quoting Brown v. Vasquez, 952 F.2d at 1165); Steffen v. Tate, No. C-1-92-495, unpublished slip op., 3-4 (S.D. Ohio June 18, 1992) ("The Court is faced with the imminent prospect that unless it acts promptly to grant petitioner's request, [for a stay] petitioner will be executed without ever obtaining federal review of his constitutional claims. The Court strongly believes that petitioner is entitled to such review, and nothing in McCleskey or any other decisions of the United States Supreme Court is to the contrary.").

Moreover, it should be noted that this is not a routine "circuit split." These three Courts of Appeals together contain the majority of large death penalty jurisdictions in the United

States.¹ The states in the Fifth and Ninth Circuit also are notorious for their poor record in providing post-conviction habeas counsel for indigent unrepresented death row inmates. See Marcia Coyle et al., Fatal Defense, NATIONAL LAW JOURNAL, June 11, 1990. Thus, this circuit split will repeatedly present itself to this Court in the foreseeable future. Thus, the Court should grant certiorari now in order to resolve the issue once and for all.

II. THE COURT OF APPEALS, IN ITS RUSH TO JUDGMENT, ENTIRELY IGNORED PETITIONER'S ARGUMENTS INVOKING THE ALL WRITS ACT AND VARIOUS CONSTITUTIONAL PROVISIONS.

As disturbing as the Court of Appeals' cursory analysis of the 28 U.S.C. § 2251 jurisdictional issue was the Court's failure to address Petitioner's arguments relating to the All Writs Act and various constitutional provisions that may trump the Anti-Injunction Act, assuming it is otherwise applicable. Such a "rush to judgment" mentality has increasingly been evident in capital habeas cases decided by the Fifth Circuit. See, e.g., Gosch v. Collins, ___ F.2d ___ (5th Cir. September 16, 1993), cert. pending (petition filed September 16, 1993). At the very minimum, this Court should issue a stay, vacate the judgment of the Court of Appeals, and remand for more careful consideration.

¹ The Ninth Circuit contains California. The Fifth Circuit contains Louisiana and Texas. The Eleventh Circuit contains Florida and Georgia.

III. THE CONTINGENCY OF A STAY BY THE FIFTH CIRCUIT

By force of circumstances, late this afternoon Petitioner filed a perfunctory habeas corpus "petition" in the district court. Counsel has been informed orally that, while the petition has not been denied, the accompanying motion for a stay has been denied by the district court. Counsel has not yet been forwarded the order. The potential that, as a result, the Fifth Circuit will grant a stay should not keep this Court from acting on this petition. Notably, the case number assigned to the perfunctory petition filed is No. 4:93-CV-723-A. The district court case number is the instant case is No. 4:93-CV-714-A. Thus, any action in cause No. 4:93-CV-723-A will not moot the issues presented in the instant case.

More importantly, as a matter of this Court's mootness doctrine, even assuming that the Fifth Circuit ultimately did in fact enter a stay and appoint counsel, that occurrence would not moot the issues in the instant case because they are capable of repetition yet evading review. See generally Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, § 3-11, at 89-90 (1988).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and enter a stay of execution.

Respectfully submitted,

FRANK BASIL MCFARLAND

By: Mandy Welch
* Mandy Welch
Joe Margulies
Brent E. Newton
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
fax (713) 522-2733

Temporary counsel for Petitioner Only for Purposes of Filing this Petition for Writ of Certiorari

* Counsel of record and member of Supreme Court Bar

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of this pleading has been faxed to:

Enforcement Division
Office of the Attorney General
209 West 14th Street
Price Daniel, Sr. Building
8th Floor
Austin, TX 78701,

this 26th day of October, 1993.

Mandy Welch
by agrees permanence
B. E. Newton

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FRANK BASIL MCFARLAND

Petitioner,

VS.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL
DIVISION

Respondent.

NO. 4:93-CV-723-A

ORDER

Came on to be considered in the above styled and numbered action the motion of petitioner, Frank Basil McFarland, ("McFarland") for leave to file amended habeas petition. After having reviewed the motion, the court concludes that it is without merit. Moreover, the motion is not accompanied by a proposed amended petition as required by Rule 5.2(b) of the Local Rules of the United States District Court for the Northern District of Texas. Therefore,

The court ORDERS that such motion of McFarland be, and is hereby, denied in its entirety.

SIGNED October 26, 1993.

JOHN MCBRYDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

NANCY DOHERTY, CLERK
By [Signature]
Deputy

FRANK BASIL MCFARLAND §
 §
 Petitioner, §
 §
VS. § NO. 4:93-CV-723-A
 §
JAMES A. COLLINS, DIRECTOR, §
TEXAS DEPARTMENT OF CRIMINAL §
JUSTICE, INSTITUTIONAL §
DIVISION §
 §
 Respondent. §

O R D E R

Came on to be considered in the above styled and numbered action the motion of petitioner, Frank Basil McFarland, ("McFarland") for stay of execution. The court concludes that the motion for stay should be denied.

On November 15, 1989, McFarland was convicted of capital murder and sentenced to death in the Criminal District Court Number Three of Tarrant County, Texas, the Honorable Don Leonard presiding. On September 23, 1992, McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992). On June 6, 1993, McFarland's petition for writ of certiorari to the United States Supreme Court was denied. McFarland was represented by counsel at each of the above mentioned stages. On August 16, 1993, Judge Leonard entered an order scheduling McFarland's execution for September 23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to

October 27, 1993. On October 22, 1993, McFarland filed in this court under docket number 4:93-CV-714-A motions (i) for stay of execution and request for appointment of counsel and (ii) for leave to proceed in forma pauperis. On October 25, 1993, the court denied McFarland's motions on the basis that the court did not have jurisdiction to grant them because there was not a habeas corpus proceeding before the court. McFarland has not sought habeas relief from any state court.

At approximately 5:45 p.m. on October 26, 1993, McFarland filed a petition for writ of habeas corpus and a motion for stay of execution, which were filed under docket number 4:93-CV-723-A. The initial matter to be considered by the court is whether the stay should be granted. McFarland does not have the right to an automatic stay pending his first federal habeas corpus petition, regardless of the merits presented. Autry v. Estelle, 464 U.S. 1, 2 (1983). "The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted." Barefoot v. Estelle, 465 U.S. 680, 695 (1983). As the Fifth Circuit noted in McFarland v. Collins, No. 93-1954 (5th Cir. October 26, 1993), McFarland must show, if not a probability of success on the merits, at least a substantial case on the merits when a serious legal question is involved.

In his petition, McFarland states as his only claim for relief: "The admission of hypnotically-enhanced testimony was a deprivation of petitioner's rights to confront witnesses, to the effective assistance of counsel, and to due process of law."

Petition for writ of habeas corpus, 3. The petition briefly touches on the alleged deprivation of confrontation and denial of due process, but does not contain any discussion of alleged ineffective assistance of counsel.¹

The court has conducted an independent review of the September 23, 1992, opinion of the Texas Court of Criminal Appeals on McFarland's direct appeal of his conviction and sentence². McFarland raised on appeal the issues of (i) the trial court's failure to make findings of fact and conclusions of law in ruling on the admissibility of the testimony in question ("first issue") and (ii) failure to hear testimony from McFarland's expert ("second issue"). He did not raise the issue now presented that he was denied effective cross examination and due process. Thus, McFarland did not begin to exhaust his state court remedies as to that issue. Therefore, that issue cannot provide basis for granting habeas corpus relief. Picard v. Conner, 404 U.S. 270, 275-76 (1971); Thomas v. Collins, 919 F.2d 333, 334 (5th Cir. 1990).

The first issue does not raise a claim of constitutional magnitude. As to the second issue, McFarland's petition does not

¹Based on the very facts recited by McFarland in his petition, a claim of ineffective assistance would not stand on the ground alleged. See Strickland v. Washington, 466 U.S. 668, 687 (1984). In any event, McFarland did not raise this issue on direct appeal nor did he exhaust available state habeas corpus remedies in this regard. Therefore, the court is foreclosed from considering the issue.

²See McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992), cert. denied, 113 S. Ct. 2937 (1993).

suggest any legal harm that he has suffered as a result of the state's failure to hear testimony from his expert.

Moreover, as to all theories urged in the petition, the court notes that the trial court found that "the hypnosis neither rendered the post hypnotic memory untrustworthy nor substantially impaired the ability of the opponent to test the witness' recall by cross examination." S.F. vol. 30, 575. Section 2254(d) provides that the fact finding of the state court "shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear" that certain conditions enumerated therein exist. 28 U.S.C. §2254(d). McFarland has not made any allegation that would suggest that the trial court's findings should not be accepted by the court.

Furthermore, the Fifth Circuit noted that "even if McFarland's pleadings are characterized as a federal habeas petition, the district court would be obliged to dismiss it for failure to exhaust the claims." McFarland v. Collins, No. 93-1954, slip op. at 3, n.1.

For the reasons stated above, McFarland has not satisfied the standard expressed by the United States Supreme Court in Barefoot. Therefore,

The court ORDERS that the motion of McFarland for stay of execution be, and is hereby, denied.

SIGNED October 26, 1993.

JOHN MCBRYDE
United States District Judge

Filed
10/26/93
H. W. V. 6

S

ORDER

JOHN McBRYDE
United States District Judge

No. 93-6497

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FRANK BASIL McFARLAND,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
for Criminal Justice

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

*MARGARET PORTMAN GRIFFEY
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

* Counsel of Record

QUESTIONS PRESENTED

- 1. Whether there is federal statutory authority for staying a state execution and appointing counsel to assist a death sentenced inmate in federal habeas review if a petition has not been filed raising substantial grounds for relief and vesting the federal courts with jurisdiction?
- 2. Whether the Constitution requires that counsel be appointed to assist a death-sentenced inmate in state and federal habeas review?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	6
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. THERE IS NO FEDERAL STATUTORY AUTHORITY FOR STAYING A STATE EXECUTION AND APPOINTING COUNSEL TO ASSIST A DEATH-SENTENCED INMATE IN FEDERAL HABEAS REVIEW IF A PETITION HAS NOT BEEN FILED RAISING SUBSTANTIAL GROUNDS FOR RELIEF AND VESTING THE FEDERAL COURTS WITH JURISDICTION.	10
A. McFarland did not properly invoke the district court's habeas jurisdiction, and under these circumstances, a stay of execution is not authorized by federal law.	10
B. The application for stay and counsel cannot be "deemed" to be a petition.	14
II. THE CONSTITUTION DOES NOT REQUIRE THAT COUNSEL BE APPOINTED TO ASSIST A DEATH-SENTENCED INMATE IN STATE AND FEDERAL HABEAS REVIEW.....	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	Page
<i>Amalgamated Clothing Workers of America v. Richman Bros.</i> , 348 U.S. 511 (1955)	11
<i>Autry v. Estelle</i> , 464 U.S. 1 (1983)	11
<i>Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Eng'rs.</i> , 398 U.S. 281 (1970)	11
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	11
<i>Chick Kam Choo v. Exxon Corp.</i> , 486 U.S. 140 (1988)	11
<i>Connaway, In re</i> , 178 U.S. 421 (1900)	12
<i>Murray v. Giarratano</i> , 492 U.S. 1 (1989)	15,16,17
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987)	15
<i>United States v. McCollum</i> , 426 U.S. 317 (1976)	15,16
<i>Vendo Co. v. Lektro-Vend Corp.</i> , 433 U.S. 623 (1977)	11
Constitutions, Statutes and Rules	
U. S. Const., amend. VIII	2
U. S. Const., amend. XIV	2
21 U.S.C. § 848(q)(4)(B)	2,9,13
28 U.S.C. § 1651	2,9,13
28 U.S.C. § 2251	2,9,12
28 U.S.C. § 2254	2,9,13,14
28 U.S.C. § 2255	16
28 U.S.C. § 2283	2,9,10
TEX. CODE CRIM. PROC. ANN. art. 1.051(d)(3)	16
TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1991)	3
TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991)	2
Rule 4, 28 U.S.C. fol. § 2254	12

TABLE OF AUTHORITIES, continued

	Page
Fed. R. Civ. P. 3	12
Fed. R. Civ. P. 4(d)	12
Fed. R. Civ. P. 41(a)	6
Fed. R. Civ. 65(d)	12
Miscellaneous	
7 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE	12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FRANK BASIL McFARLAND,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Respondent James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division,¹ by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying a certificate of probable cause to appeal and a stay is attached to the petition as Appendix A. The opinion of the United States District Court for the

¹ For clarity, the petitioner is referred to as "McFarland" and the respondent as "the Director".

Northern District of Texas, Fort Worth Division, is attached to the petition as Appendix B.

STATEMENT OF JURISDICTION

McFarland seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 2254. Nonetheless, because the courts below denied a certificate of probable cause to appeal, this case never was "in" the court of appeals for purposes of appeal under § 2254. As set forth *infra*, there is no jurisdiction pursuant to the All Writs Act, codified at 28 U.S.C. § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

McFarland bases his claims upon the Eighth and Fourteenth Amendments and 28 U.S.C. § 2251, 28 U.S.C. 1651(a), 28 U.S.C. § 2283, and 21 U.S.C. § 848 (q) (4) (B).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The Director has lawful custody of McFarland pursuant to a judgment and sentence of the Criminal Court Number 3, Tarrant County, Texas. McFarland was indicted on March 23, 1988 in Cause Number 0336837D for the capital murder of Terry Hokanson in the course of committing aggravated sexual assault. See TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991). McFarland entered a plea of "not guilty" to the indictment. Trial on the merits commenced on October 26, 1989, and on November 13, 1989, the jury returned a verdict of guilty as charged in the indictment. Following a separate hearing on punishment, the same jury affirmatively answered two special issues submitted to it pursuant to Texas

Code of Criminal Procedure, Article 37.071(b) (Vernon Supp. 1991).² Thereafter, the trial court sentenced McFarland to death by lethal injection.

McFarland's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. McFarland was represented on direct appeal by Jack V. Strickland and Michael Ware of Fort Worth, Texas. On September 23, 1992, the Court affirmed McFarland's conviction and sentence. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). Rehearing was denied on December 9, 1992. The Texas Resource Center (hereinafter "the Center") withdrew records of McFarland's trial and appeal from the Court of Criminal Appeals on January 19, 1993, and returned them on January 25, 1993. See Appendix A to Respondent's Opposition to Application for Stay of Execution in the district court (Clerk's affidavit).

² Pursuant to Article 37.071, McFarland's jury was required to answer the following special sentencing issues:

Special Issue No. 1

Was the conduct of the Defendant, Frank Basil McFarland, that caused the death of Terry Hokanson, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2

Is there a probability that the Defendant, Frank Basil McFarland, would commit criminal acts of violence that would constitute a continuing threat to society?

Tr. II: 436-37. "Tr" refers to the transcript of McFarland's trial, followed by the volume and page. "R" refers to the statement of facts of his trial, followed by the volume and page number.

Mr. Strickland evinced his intent to continue representing McFarland by filing on December 12, 1992, a motion to stay the mandate in the Court of Criminal Appeals to allow adequate time to file a certiorari petition. See Appendix B to Respondent's Opposition to Application for Stay of Execution in the district court (Strickland's Motion to Stay the Mandate). This was apparently Strickland's last appearance as counsel for McFarland. The motion was granted, and mandate was stayed until March 12, 1993. After receiving correspondence from the Center on March 11th and April 19th, McFarland wrote to Mr. Strickland. See Appendix C to Opposition to Application for Stay of Execution in the district court (TDCJ-ID-Outgoing Mail Log). Following that correspondence, Mr. Strickland no longer appeared as counsel of record.

On March 9, 1993, Isaiah Gant of Nashville, Tennessee, an attorney recruited by the Center, filed a petition for writ of certiorari, which was denied on June 6, 1993. *McFarland v. Texas*, 113 S.Ct. 2937 (1993). Over two months later, on August 16, 1993, Judge Leonard entered an order scheduling McFarland's execution for September 23, 1993. See Appendix D to Opposition to Application for a Stay of Execution in the district court (order setting execution and cover letter). By letter dated September 19, 1993, Eden Harrington of the Center asked Judge Leonard to withdraw McFarland's scheduled execution date because it would take "at least 120 days" to locate new counsel for McFarland. See Appendix E to Respondent's Opposition to Application for Stay of Execution in the district court (letter and proposed order). The following day, the trial court conducted a hearing attended by Lynn Lamberty of the Center and representatives of the Tarrant County District Attorney's office. Lamberty asked the Court to withdraw McFarland's execution to allow the Center to find new counsel, and to allow newly recruited counsel to file a state habeas application "within 120 days after the notice of recruitment of counsel is filed with this Court." *Id.* (proposed

order). Judge Drago, sitting for Judge Leonard for purposes of the hearing only, denied the Center's request and ordered the modification of McFarland's execution to October 27, 1993. See Appendix F to Opposition to Application for Stay of Execution in the district court (cover letter, order modifying, and death warrant).

Judge Leonard received a second letter and proposed order from the Center, dated October 16, 1993. In the letter, the Center stated that it still had not secured counsel for McFarland, and again asked the court to withdraw the execution date. See Appendix G to Opposition to Application for Stay of Execution in the district court (letter and proposed order). On October 21, 1993, with the assistance of the Center, McFarland filed a *pro se* application for stay of execution and motion for appointment of counsel in the Court of Criminal Appeals. See Appendix H to Opposition to Application for Stay of Execution in the district court. Neither the stay application nor the motion for appointment of counsel was presented to the trial court. Appendix I to Opposition to Application for Stay of Execution in the district court (Affidavit of Tarrant County Clerk). The Court of Criminal Appeals denied the application for stay and motion on Friday, October 22, 1993. Appendix J to Opposition to Application for Stay of Execution in the district court (Order denying).

The same day, with the assistance of the Center, McFarland filed *pro se* a Motion for Stay of Execution and for Appointment of Counsel in the United States District Court for the Northern District of Texas, Fort Worth Division, docketed as No. 4:93-CV-714-A. No federal habeas corpus petition was filed. On October 25, 1993, the district court denied a stay of execution because McFarland had not invoked its jurisdiction by filing a federal habeas petition. On October 26th, the district court struck from the record McFarland's application for a certificate of probable cause to appeal (CPC) because the action did not represent an habeas proceeding. The United States Court of Appeals for the Fifth Circuit denied CPC

and a stay at approximately 6 p.m. the same day. This Court then granted McFarland's subsequent application for stay of execution pending disposition of the instant petition for certiorari review.

At approximately 6 p.m. on October 26th, McFarland filed a motion for appointment of counsel and stay of execution and a federal petition for writ of habeas corpus, No. 4:93-CV-723-A, in which he raised one ground for relief. In an order that addressed the merits of McFarland's claim, the district court denied a stay of execution. McFarland's subsequent motion for leave to file an amended habeas petition did not include any additional grounds for relief and was denied by the district court at approximately 8:30 p.m. CPC was denied by the district court at 10:17 p.m. A motion for stay of execution was thereafter granted by the Fifth Circuit at approximately 11:50 p.m. His application for CPC is still pending before the Court. On October 28th, McFarland filed in the district court a notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a).

B. Statement of Facts

The Court of Criminal Appeals found the following facts:

Viewed in the light most favorable to the verdict, the evidence at trial established the following facts. On the afternoon of February 1, 1988, the victim went to work at a bar in Arlington. Appellant and a friend of his, Michael Ryan Wilson, were also at the club on this day. At some point in the afternoon, the two men had a drink sent over to the victim. Later, a waitress introduced the victim to the two men. Appellant, Wilson, the victim, and a waitress made plans to go to another bar together later that evening, although the waitress canceled her part of the arrangement.

Around 7:00 p.m. or 8:00 p.m. that evening, the victim went home to change and eat dinner before going out. Several employees of the second bar

remember seeing a woman, who fit the description of the victim, arrive alone between 8:00 p.m. and 9:00 p.m. They also recalled her leaving shortly thereafter with two men. Her car was found in the parking lot the next morning.

Approximately 10:00 p.m. or 11:00 p.m. that evening, three teenage boys were walking by a public park when they heard a scream. One stood on a nearby bench to look for the police and saw a car driving away. As the boys continued walking, they noticed someone stumbling in a "kind of drunk manner." As they got closer to the figure, they realized the figure was a woman. When they reached her, they noticed that she had blood on her face. One of the boys asked if she needed help, to which she replied that she did. The other boy immediately ran to the nearest house to call for help. The victim told the boys that she had been sexually assaulted and stabbed.

While the one boy was away, a police officer happened upon the scene. The boys told the officer that the victim said that she had been sexually assaulted and stabbed. As the officer approached the victim, he could see that she had blood on her face, jacket, and shirt, and her hand was cut to the bone. The officer tried to question the victim as much as possible. The victim told him that "[t]hey raped and stabbed me." The officer elicited further information that the two assailants were white men and that the victim had met them at the club where she worked. The officer could not later remember the name of the club, but he was subsequently placed under hypnosis, at which time that information was elicited. When the paramedics arrived, the victim also told them that she had been sexually assaulted and stabbed. The victim died about 3:00 a.m.

A search of the area where the victim was found turned up her purse, shoes, watch, and one earring in a pool of blood at the top of the hill. Additionally, a five hundred foot trail of blood led from where the victim's belongings were found to where she had been

discovered. An autopsy revealed that the victim had been stabbed by at least two different types of knives and knife-like weapons. The examination also revealed evidence of sexual intercourse, but was inconclusive as to whether the victim had been sexually assaulted.

At trial, Wilson's girlfriend, Rachael Revill, testified that on the night in question, appellant and Wilson arrived at her apartment. They had left the apartment together in appellant's car earlier that evening and were not returning together. Revill noticed that Wilson's pants appeared to be stained with blood and appellant appeared to have a gash on his hand. After Wilson showered, changed, and gathered his blood-stained clothing, the two men again left. Wilson returned about fifteen minutes later without appellant. Revill said Wilson was surrounded by a "burning odor." Wilson later told his girlfriend that he had burned his clothes because they had blood on them. He also explained that he and appellant had "had to get rid of a girl" because she knew too much about their drug business. Wilson insisted that appellant had actually killed the victim.

At a later time, appellant again picked Wilson up from Revill's apartment and they went to the club where the victim had worked on the day she was killed. Appellant asked a waitress if any detectives had asked anything about him or Wilson. The waitress observed scratch marks down appellant's cheek. Subsequently, Wilson contacted an acquaintance of his and appellant's, Mark Noblett. He told Noblett that he and appellant had been to a club with the victim and that later, appellant sexually assaulted and stabbed the victim. Wilson also told Noblett that he was afraid of appellant and wanted Noblett to approach the police on his behalf. The two men agreed to meet the next day, but Wilson never showed.

On March 11, 1988, Wilson was found dead in Weatherford. Four days later, Revill contacted the police and told them of Wilson's confession to her on

the night of the victim's murder. Warrants were then issued to obtain blood, saliva, and hair samples from appellant and to impound and search his automobile. The search of appellant's vehicle uncovered hairs which proved to be microscopically similar to those found in a rabbit coat of the type that the victim was wearing the night she was killed. A scarf was also discovered on which was found a pubic hair microscopically similar to the victim's. Finally, the police recovered an earring which was not distinguishable from the earring found at the scene of the murder. A DNA analysis of the semen recovered from the victim's body and found on her clothes did not eliminate appellant as a donor, although it did conclusively establish that, if Wilson was a donor, he was not the sole donor.

McFarland v. State, 845 S.W.2d 824, 828-300 (Tex. Crim. App. 1992).

SUMMARY OF ARGUMENT

McFarland did not invoke the district court's jurisdiction by filing a petition. Under 28 U.S.C. § 2251 a federal court may stay a state court proceeding only if a habeas action has been commenced by the filing of a petition and, thus, is pending before the court. A stay was not proper pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, which authorizes federal courts to preserve their jurisdiction, not to issue an injunction to preserve a hypothetical case or controversy. Similarly, the All Writs Act, 28 U.S.C. § 1651 (a) authorizes injunctions only in aid of the court's jurisdiction. 21 U.S.C. § 848 (q)(4) (B) addressed the question of appointment of counsel. It does not authorize an injunction of state court proceedings, but rather assumes the invocation of federal habeas jurisdiction under 28 U.S.C. § 2254.

The Constitution does not require that counsel be appointed to assist a death-sentenced inmate in state and federal habeas review. Further, McFarland's alleged lack of representation in the state court cannot be attributed to deficient

mechanisms or inadequate resources for obtaining representation in state habeas review. Rather his "*pro se*" status results from a fortuitous simultaneous inability by the Center to recruit counsel and a disinclination on the part of the Center to assume representation, despite the Center's having obtained the appellate records of McFarland's trial nine months and having corresponded with McFarland both before and after the denial of certiorari and before his first scheduled execution date.

ARGUMENT

I.

THERE IS NO FEDERAL STATUTORY AUTHORITY FOR STAYING A STATE EXECUTION AND APPOINTING COUNSEL TO ASSIST A DEATH-SENTENCED INMATE IN FEDERAL HABEAS REVIEW IF A PETITION HAS NOT BEEN FILED RAISING SUBSTANTIAL GROUNDS FOR RELIEF AND VESTING THE FEDERAL COURTS WITH JURISDICTION.

A. *McFarland did not properly invoke the district court's habeas jurisdiction, and under these circumstances, a stay of execution is not authorized by federal law.*

The Anti-Injunction Act, 28 U.S.C. § 2283, provides that a federal court may not enjoin state proceedings except in limited circumstances:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This statute is a Congressional command, fundamentally different from judicially created doctrines such as abstention. "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here

expressed in a clear-cut prohibition qualified only by special defined exceptions." *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 515-16 (1955). The Act is an "absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions," and the Supreme Court has expressly rejected the argument that the Act established a principle of comity rather than a binding rule. *Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281, 286 (1970). The Supreme Court unanimously reaffirmed the holdings of *Clothing Workers* and *Atlantic Coast Line* in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-50 (1988). The Anti-Injunction Act authorizes federal district courts to preserve their jurisdiction; it does not authorize an injunction to preserve a hypothetical case or controversy. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (plurality opinion) (the concurring Justices expressed no disagreement with the plurality's analysis of the "aid of jurisdiction" point, which was necessary to the judgment in which they concurred).

The district court could not have issued a stay in aid of its jurisdiction because McFarland did not invoke the district court's habeas jurisdiction by filing a petition. Consequently, the district court lacked jurisdiction to issue an order staying execution of a final and presumptively valid state judgment, and appellate jurisdiction is also lacking. Even where a petition is filed, the granting of a stay "should reflect the presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). A petitioner does not have a right to an automatic stay pending his first federal habeas corpus petition, regardless of the merits presented. *Autry v. Estelle*, 464 U.S. 1, 2 (1983).

In addition, no act of Congress expressly authorizes the grant of a stay of execution in the absence of a federal habeas petition. Indeed, the statutes

condition the stay of a state court order of execution on the pendency of a federal habeas action.

Federal Habeas Statute

A specific statute, 28 U.S.C. § 2251, authorizes stays of state court proceedings only by a judge or justice "before whom a habeas corpus proceeding is pending." A habeas action is "pending" under § 2251 when the petition is filed. In *In re Connaway*, 178 U.S. 421 (1900), the Supreme Court held that "[t]he filing of the complaint . . . is the commencement of the action and the jurisdiction of the court over the case." *Id.* at 427-28. Fed. R. Civ. P. 3 is indistinguishable from the statute that the Supreme Court construed in *Connaway*³: "A civil action is commenced by filing a complaint with the court."

The requirement that an action be pending is implicit in Fed. R. Civ. P. Rule 65(d). "Every order granting an injunction . . . is binding only upon the parties to the action . . ." and persons in privity with parties. If there is no action there can be no parties, and no one is bound by the injunction.

"Where such party [to be enjoined] is a defendant, jurisdiction over the defendant implies either voluntary appearance by him or effective service of process." 7 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* para. 65.03[3] at 65-27 and 65-28. The process to be served is the summons and complaint together in a regular civil action, Fed. R. Civ. P. 4(d), and is the petition in a habeas case. Rule 4, 28 U.S.C. fol. § 2254. Without service there is no jurisdiction, and again the person sought to be enjoined is not legally bound. Today, the Director is not a "person not before the court." He was not

³ When *Connaway* was decided, the federal courts adopted the procedural statutes of the states in which they sat, absent an applicable federal statute. See 2 Moore § 1.02[1] at p. 1-5.

served with a habeas corpus petition or any other process that would make him a party to the action. No one had been made a party respondent or defendant, because no action had commenced.

All Writs Act

McFarland cannot invoke the All Writs Act, 28 U.S.C. § 1651(a), as a basis for obtaining a stay of execution. The Act authorizes injunctions only in aid of the court's jurisdiction. For the reasons discussed above, however, McFarland did not properly invoke the jurisdiction of the district court below. As such, there can be no stay "in aid of jurisdiction" under the All Writs Act.

Criminal Justice Act

McFarland also relies on a provision of the Criminal Justice Act, 21 U.S.C. § 848(q)(4)(B), to support his claim that the district court below was required to issue a stay of execution. According to McFarland, a stay of execution is a "necessary concomitant" to the statute's provision for appointment of counsel in federal habeas actions.

Section 848(q)(4)(B) addresses the question of appointment of counsel. It does not expressly authorize the injunction of state court proceedings, which is necessary to overcome the Anti-Injunction Act. Nor is section 848(q)(4)(B) a jurisdictional statute that even arguably might confer jurisdiction independent of the filing of a federal habeas petition. To the contrary, the provision quoted by McFarland makes clear that the statute *assumes* the invocation of federal habeas jurisdiction: "*In any post conviction proceeding under section 2254 . . . of Title 28, seeking to vacate or set aside a death sentence, any defendant who is . . . financially unable to obtain adequate [legal] services shall be entitled to the appointment of one or more attorneys. . . .*"

In sum, the court below neither had jurisdiction of the subject matter nor jurisdiction over the person. The entry of a stay was not authorized by statute or necessary to preserve jurisdiction properly invoked.

B. *The application for stay and counsel cannot be "deemed" to be a petition.*

McFarland's stay application and motion for appointment of counsel, standing alone, were insufficient to invoke the district court's jurisdiction under 28 U.S.C. § 2254. McFarland has had nearly five months—since the June 6, 1993 denial of his certiorari petition—to prepare a habeas application.

In exhibits to McFarland's motion for stay and for counsel, the Center asserts a variety of reasons to explain its failure file a state habeas application in the trial court and a federal habeas petition in the district court.⁴ Most prominent among them is the inability to timely locate counsel to represent the petitioner. The Center recruited Isaiah Gant to represent McFarland in the Supreme Court. Apparently it was known at the outset of the Supreme Court proceedings that Mr. Gant did not intend to further represent McFarland. At the very least, the fact that new counsel would be needed was known by the time certiorari was denied on June 6th. In fact, mail logs from the Texas Department of Criminal Justice-Institutional Division reflect that McFarland received correspondence from the

⁴ The Center never asked the trial court to modify McFarland's execution date for a specified time to enable him to file a state habeas application. The Center's open-ended proposed order only asked that the date be withdrawn and that a habeas application would be filed "within 120 days after the notice of recruitment of counsel is filed with this Court." See Appendix E to Respondent's district court Opposition to Application for Stay of Execution (Proposed Order). Moreover, in telephone conversations with representatives of the Tarrant County District Attorney's office, the Center repeatedly was told that the State would not oppose a stay of execution if the Center or their recruited counsel would file a state habeas application. See *id.*, Appendix K (Affidavits of Assistant District Attorneys Edward Wilkinson, Charles Mallin, and Betty Marshall).

Center both before and after the denial of certiorari and *before* his initial execution date was scheduled.⁵ Notwithstanding the Center's claim that it is nearly impossible to recruit counsel after an execution date is set, in this case it knew that McFarland would require representation well in advance of the trial court's initial order of August 16, 1993, setting his execution for September 23rd.⁶

Without the initial petition, there was nothing before the district court upon which to predicate a stay.

II.

THE CONSTITUTION DOES NOT REQUIRE THAT COUNSEL BE APPOINTED TO ASSIST A DEATH-SENTENCED INMATE IN STATE AND FEDERAL HABEAS REVIEW.

Relying on *Murray v. Giarrratano*, 492 U.S. 1 (1989), McFarland argues that his federal constitutional right of access to the courts guaranteed by the Due Process and Equal Protection Clauses was infringed by the district court's and the Texas Court of Criminal Appeals' denials of his motions for appointment of counsel and application for stay of execution. Not only are "[s]tate collateral proceedings . . . not constitutionally required as an adjunct to state criminal proceedings," if a state provides for collateral review, due process does not secure the same procedural protections as those on direct appeal. *Murray v. Giarrratano*, 492 U.S. at 10; see *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *United*

⁵ McFarland received mail from the Center on March 11, 1993, April 19, 1993, and July 10, 1993. See Appendix C to Respondent's Opposition to Application for Stay of Execution in the district court.

⁶ The Center has represented death-sentenced inmates in state habeas proceedings in the absence of a scheduled execution. For example, the Center currently is representing inmate Jonathan Nobles in state habeas corpus proceedings in Travis County although an execution date has not been set.

States v. McCollum, 426 U.S. 317, 322-28 (1976) (neither due process nor equal protection require that indigent petitioners under 28 U.S.C. § 2255 be given a trial transcript to aid their pursuit of collateral relief). In *Giarrratano*, Chief Justice Renquist speaking for a plurality of the Court, concluded that neither the Eighth Amendment nor due process require a state to appoint counsel to assist death-sentenced inmates in state collateral review. 492 U.S. at 10.

McFarland relies on Justice Kennedy's concurrence and the dissent in *Giarrratano* for the proposition that a failure to provide indigent death-sentenced inmates with appointed counsel in state and federal habeas review violates their constitutional right of access to the courts. The reliance on *Giarrratano* is misplaced. In Texas, the initiation of state habeas proceedings by a death-sentenced inmate is triggered by the setting of an execution date. At that time, counsel is appointed by the trial court⁷ or recruited by the Texas Resource Center either to assist the inmate in state habeas review. In his dissent in *Giarrratano*, Justice Stevens noted that, of the thirty-seven States authorizing capital punishment, eighteen automatically provided indigent death row inmates with counsel to initiate their state habeas proceeding and thirteen, among these Texas, have governmentally funded resource centers to assist counsel in litigating capital cases. Representation is thus provided to Texas' death-sentenced inmates by either of the alternative methods approved by the dissent.

⁷ Article 1.051 (d) (3) of the Texas Code of Criminal Procedure provides as follows:

(d) An eligible indigent defendant is entitled to have the trial court

- appoint an attorney to represent him in the following appellate and
- post-conviction matters:

(3) a habeas corpus proceeding if the court concludes that the interests of justice require representation;

This is not a case in which there is no mechanism in place to provide counsel to a death-sentenced inmate and, thus, does not raise the issue that McFarland argues was left open in *Giarratano*. McFarland's petition for certiorari review on direct appeal was filed on March 9, 1993, by Center-recruited counsel. Moreover, certiorari review was denied by the Court on June 6, 1993. The alleged inability of the Center to recruit counsel or itself provide representation to McFarland in state collateral review can, at best, only reflect the most abysmal lack of record keeping by the Center and a resulting failure to secure McFarland's easily anticipated need for representation. Alternatively, the alleged failure to recruit state habeas counsel must be understood by its consequences to be an attempt to manipulate the appearance of a "crisis in representation" when in fact none exists--a delay mechanism to the review process that should not be tolerated by the Court.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that McFarland's petition for writ of certiorari be denied.

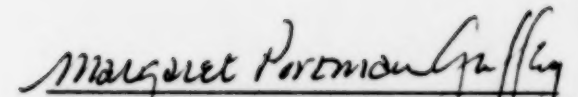
Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
for Criminal Justice

MARGARET PORTMAN GRIFFEY
Assistant Attorney General
Chief, Capital Litigation Division


MARGARET PORTMAN GRIFFEY*
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Fax No. (512) 463-2084

ATTORNEYS FOR RESPONDENT

*Counsel of Record

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

October 27, 1993

AREA CODE 202
479-3011

Ms. Mandy Welch
Texas Resource Center
3223 Smith Street, #215
Houston, TX 77006

Re: Frank B. McFarland
v. James A. Collins, Director, Texas
Department of Criminal Justice,
Institutional Division
No. 93-6497 (Application No. A-375)

Dear Ms. Welch:

The Court today entered the enclosed order in the above-entitled case.

Very truly yours,

WILLIAM K. SUTER, Clerk

By

Cynthia J. Rapp
Assistant Clerk

Enc.

cc: Dan Morales
Clerk, U.S. Court of Appeals for the
Fifth Circuit (Your No. 93-1954)

ORDER LIST

WEDNESDAY, OCTOBER 27, 1993

ORDER IN PENDING CASE

93-6497
(A-375)

MCFARLAND, FRANK B. V. COLLINS, DIR., TEXAS DCJ

The application for stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is granted pending the disposition by this Court of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

A- 360

(5)

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

**RESPONDENT'S OPPOSITION TO APPLICATION
FOR STAY OF EXECUTION**

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General for Criminal Justice

ROBERT S. WALT
Assistant Attorney General
Chief, Capital Litigation Division

MARGARET PORTMAN GRIFFEY*
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

* Counsel of Record

A- _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

**RESPONDENT'S OPPOSITION TO APPLICATION
FOR STAY OF EXECUTION**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Opposition to Application for Stay of Execution.

OPINION BELOW

The order of the Texas Court of Criminal Appeals denying McFarland's motion for appointment of counsel and application for stay of execution is not published. It is attached as Appendix A to the petition.

JURISDICTION

McFarland seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

McFarland bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of proceedings and disposition below

The State has lawful custody of McFarland pursuant to a judgment and sentence of the Criminal Court Number 3, Tarrant County, Texas, the Honorable Don Leonard presiding. McFarland was indicted on March 23, 1988 in Cause Number 0336837D for the capital murder of Terry Hokanson in the course of committing aggravated sexual assault. See TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991). McFarland entered a plea of "not guilty" to the indictment. McFarland was represented at trial by Tolly Wilson and Sharen Wilson of Fort Worth. Trial on the merits commenced on October 26, 1989. On November 13, 1989, the jury returned a verdict of guilty as charged in the indictment. Following a separate hearing on punishment, the same jury affirmatively answered two special issues submitted to it pursuant to Texas Code of Criminal Procedure, article 37.071(b) (Vernon Supp. 1991).¹ Thereafter, the trial court sentenced McFarland to death by lethal injection.

¹ Pursuant to article 37.071, McFarland's jury was required to answer the following special sentencing issues:

Special Issue No. 1

Was the conduct of the Defendant, Frank Basil McFarland, that caused the death of Terry Hokanson, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2

McFarland's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. McFarland was represented on direct appeal by Jack V. Strickland and Michael Ware of Fort Worth. On September 23, 1992, the Court affirmed McFarland's conviction and sentence. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). Rehearing was denied on December 9, 1992. The Texas Resource Center (hereinafter "the Center") withdrew records of McFarland's trial and appeal from the Court of Criminal Appeals on January 19, 1993, and returned them on January 25, 1993.

Mr. Strickland evinced his intent to continue representing McFarland in this Court by filing a motion to stay the mandate in the Court of Criminal Appeals to allow adequate time to file a certiorari petition. The motion was granted, and mandate was stayed until March 12, 1993. In April, following the receipt of correspondence from the Center, McFarland wrote to Mr. Strickland. Following that correspondence, Mr. Strickland no longer appeared as counsel of record.

Thereafter, Isaiah Gant of Nashville, Tennessee, an attorney recruited by the Center, filed a petition for writ of certiorari in the United States Supreme Court. Certiorari was denied on June 6, 1993. *McFarland v. Texas*, 113 S.Ct. 2937 (1993). Over two months later, on August 16, 1993, the state convicting court Judge Leonard entered an order scheduling McFarland's execution for September 23, 1993. By letter dated September 19, 1993, Eden Harrington of the Center asked Judge Leonard to withdraw McFarland's scheduled execution date because it would take "at least 120 days" to locate new counsel for McFarland. The following day, the trial court conducted a hearing attended by Lynn Lamberty of the Center and representatives of the Tarrant

Is there a probability that the Defendant, Frank Basil McFarland, would commit criminal acts of violence that would constitute a continuing threat to society?

Tr. II: 436-37. "Tr" refers to the transcript of McFarland's trial, followed by the volume and page. "R" refers to the statement of facts of his trial, followed by the volume and page number.

County District Attorneys' office. Lamberty asked the Court to withdraw McFarland's execution to allow the Center to find new counsel, and to allow newly recruited counsel to file a state habeas application "within 120 days after the notice of recruitment of counsel is filed with this Court." Judge Drago, sitting for Judge Leonard for purposes of the hearing only, denied the Center's request and ordered the modification of McFarland's execution to October 27, 1993.

Judge Leonard received a second letter and proposed order from the Center, dated October 16, 1993. In the letter, the Center stated that it still had not secured counsel for McFarland, and again asked the court to withdraw the execution date. On October 21, 1993, with the assistance of the Center, McFarland filed a *pro se* application for stay of execution and motion for appointment of counsel in the Court of Criminal Appeals. Neither the stay application or motion for appointment of counsel were presented to the trial court. The Court of Criminal Appeals denied the application for stay and motion on Friday, October 22, 1993. It is from this denial that McFarland seeks a writ of certiorari.

The same day, with the assistance of the Center, McFarland filed *pro se* Motion for Stay of Execution and for Appointment of Counsel in the United States District Court for the Northern District of Texas, Fort Worth Division. No federal habeas corpus petition was filed. The State's Opposition to the motions was filed on Monday, October 25, 1993, and the district court denied the motions the same day. The district court denied a certificate of probable cause on Tuesday, October 26, 1993.

B. Statement of Facts

The Court of Criminal Appeals found the following facts:

Viewed in the light most favorable to the verdict, the evidence at trial established the following facts. On the afternoon of February 1, 1988, the victim went to work at a bar in Arlington. Appellant and a friend of his, Michael Ryan Wilson, were also at the club on this day. At some point in the afternoon, the two men had a drink sent over to the victim. Later, a waitress introduced the victim to the two men. Appellant, Wilson, the

victim, and a waitress made plans to go to another bar together later that evening, although the waitress canceled her part of the arrangement.

Around 7:00 p.m. or 8:00 p.m. that evening, the victim went home to change and eat dinner before going out. Several employees of the second bar remember seeing a woman, who fit the description of the victim, arrive alone between 8:00 p.m. and 9:00 p.m. They also recalled her leaving shortly thereafter with two men. Her car was found in the parking lot the next morning.

Approximately 10:00 p.m. or 11:00 p.m. that evening, three teenage boys were walking by a public park when they heard a scream. One stood on a nearby bench to look for the police and saw a car driving away. As the boys continued walking, they noticed someone stumbling in a "kind of drunk manner." As they got closer to the figure, they realized the figure was a woman. When they reached her, they noticed that she had blood on her face. One of the boys asked if she needed help, to which she replied that she did. The other boy immediately ran to the nearest house to call for help. The victim told the boys that she had been sexually assaulted and stabbed.

While the one boy was away, a police officer happened upon the scene. The boys told the officer that the victim said that she had been sexually assaulted and stabbed. As the officer approached the victim, he could see that she had blood on her face, jacket, and shirt, and her hand was cut to the bone. The officer tried to question the victim as much as possible. The victim told him that "[t]hey raped and stabbed me." The officer elicited further information that the two assailants were white men and that the victim had met them at the club where she worked. The officer could not later remember the name of the club, but he was subsequently placed under hypnosis, at which time that information was elicited. When the paramedics arrived, the victim also told them that she had been sexually assaulted and stabbed. The victim died about 3:00 a.m.

A search of the area where the victim was found turned up her purse, shoes, watch, and one earring in a pool of blood at the top of the hill. Additionally, a five hundred foot trail of blood led from where the victim's belongings were found to where she had been discovered. An autopsy revealed that the victim had been stabbed by a least two different types of knives and knife-like weapons. The examination also revealed evidence of sexual intercourse, but was inconclusive as to whether the victim had been sexually assaulted.

At trial, Wilson's girlfriend, Rachael Revill, testified that on the night in question, appellant and Wilson arrived at her apartment. They had

left the apartment together in appellant's car earlier that evening and were not returning together. Revill noticed that Wilson's pants appeared to be stained with blood and appellant appeared to have a gash on his hand. After Wilson showered, changed, and gathered his blood-stained clothing, the two men again left. Wilson returned about fifteen minutes later without appellant. Revill said Wilson was surrounded by a "burning odor." Wilson later told his girlfriend that he had burned his clothes because they had blood on them. He also explained that he and appellant had "had to get rid of a girl" because she knew too much about their drug business. Wilson insisted that appellant had actually killed the victim.

At a later time, appellant again picked Wilson up from Revill's apartment and they went to the club where the victim had worked on the day she was killed. Appellant asked a waitress if any detectives had asked anything about him or Wilson. The waitress observed scratch marks down appellant's cheek. Subsequently, Wilson contacted an acquaintance of his and appellant's, Mark Noblett. He told Noblett that he and appellant had been to a club with the victim and that later, appellant sexually assaulted and stabbed the victim. Wilson also told Noblett that he was afraid of appellant and wanted Noblett to approach the police on his behalf. The two men agreed to meet the next day, but Wilson never showed.

On March 11, 1988, Wilson was found dead in Weatherford. Four days later, Revill contacted the police and told them of Wilson's confession to her on the night of the victim's murder. Warrants were then issued to obtain blood, saliva, and hair samples from appellant and to impound and search his automobile. The search of appellant's vehicle uncovered hairs which proved to be microscopically similar to those found in a Rabbit coat of the type that the victim was wearing the night she was killed. A scarf was also discovered on which was found a pubic hair microscopically similar to the victim's. Finally, the police recovered an earring which was not distinguishable from the earring found at the scene of the murder. A DNA analysis of the semen recovered from the victim's body and found on her clothes did not eliminate appellant as a donor, although it did conclusively establish that, if Wilson was a donor, he was not the sole donor.

McFarland v. State, 845 S.W.2d 824, 828-300 (Tex. Crim. App. 1992).

I.

McFARLAND'S UNREASONABLE, ABUSIVE DELAY DISENTITLES HIM TO THE EQUITABLE REMEDY OF A STAY OF EXECUTION.

McFarland asserts that his death sentence was imposed in violation of the Eighth and Fourteenth Amendments for two reasons: (1) the state courts denied him meaningful access to the Texas judicial system in order to file a state post-conviction writ, and (2) the refusal of the Texas courts to appoint counsel for post-conviction proceedings violated his federal right to counsel. Because of the last-minute nature of his application for a stay, the Court need not address the merits of the claim. In *Gomez v. United States District Court for the Northern District of California*, 112 S.Ct. 1652, 1653 (1992), the Court noted:

Even if we were to assume, however, that Harris could avoid the application of *McCleskey [v. Zant]*, 111 S.Ct. 1454] to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. See *In re Blodgett*, ___ U.S. ___, 112 S.Ct. 674 (1992); *Delo v. Stokes*, 495 U.S. 320, 110 S.Ct. 1880 (1990) (KENNEDY, J., concurring). This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

Similarly, McFarland has had ample opportunity to present before now any claims that he wishes to raise in state or federal habeas corpus. Indeed, contrary to the Center's complaint, it has had more than ample time to recruit counsel for McFarland. The Center, in fact, recruited counsel for certiorari review, although prior appellate counsel had evinced a desire in the Court of Criminal Appeals to seek certiorari review in this Court. McFarland's conviction became final on June 6, 1993, with the Court's denial of certiorari. The trial court waited until August 16, 1993, to schedule his execution for September 23, 1993. McFarland was allowed a 30-day modification of that date, until October 27, 1993,

in which to file a state habeas application. While careful to state that it was not representing McFarland, before each pending execution date the Texas Resource Center asked the trial court to withdraw its order to allow the Center an unspecified time to recruit new counsel and "120 days from the appointment of new counsel" to file a state habeas application. McFarland never asked the trial court to appoint counsel to represent him in state habeas, and never requested that his execution date be modified or stayed for a specified time period to enable him to find counsel or to file a *pro se* habeas application. In short, he never asked the trial court for what he now seeks.

Bypassing the trial court, with the assistance of Center, on Thursday, October 22, 1993, McFarland filed a *pro se* motion for stay and for appointment of counsel in the Texas Court of Criminal Appeals which was denied the following day. The same *pro se* motions are currently pending in the federal district court. To date, no habeas petition has been filed in either state or federal court. By choosing to wait until the eleventh hour, McFarland has engaged in an obvious attempt to manipulate the judicial process. His actions disentitle him to the equitable relief of a stay of execution.

II.

McFARLAND'S CLAIM IS NOT PROPERLY BEFORE THE COURT, BECAUSE IT WAS NOT PRESENTED TO THE COURT BELOW.

Relying on *Murray v. Giarratano*, 109 S.Ct. 2765 (1989), McFarland argues that his federal constitutional right of access to the courts guaranteed by the Eighth Amendment and the Due Process Clause was denied by the Texas Court of Criminal Appeals' denial of his motion for appointment of counsel and application for stay of execution. McFarland's federal constitutional claim was not presented to the Texas Court of Criminal Appeals.

As set forth *supra*, McFarland's "*pro se*" motion for appointment of counsel and stay of execution was never properly filed in the trial court. In his motion for appointment

of counsel, McFarland stated that he (1) wished to seek state habeas relief, (2) lacked the resources, training, and knowledge to file a state habeas application, (3) was not represented by legal counsel, and (4) had asked the Texas Resource Center to recruit counsel for him. According to McFarland, the recent modification of execution date from September 23, 1993, to October 27, 1993, was insufficient to allow the Center to recruit counsel.

The cases are both legion and long-standing that the Court will not decide issues raised for the first time on petition for certiorari or appeal and that the Court will not decide federal questions not raised properly and decided in the court below. *E.g.*, *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 410 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). To properly invoke the Court's jurisdiction, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). "[W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987), quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (further citations omitted).

III.

THE STATE COURT'S FAILURE TO APPOINT COUNSEL TO ASSIST IN THE FORMULATION OF HIS STATE HABEAS APPLICATION IMPLICATES NO CONSTITUTIONAL GUARANTEE.

Not only are "[s]tate collateral proceedings . . . not constitutionally required as an adjunct to state criminal proceedings," if a state provides for collateral review, due process does not secure the same procedural protections as those on direct appeal. *Murray v.*

Giarratano, 109 S.Ct. 2765 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). In *Giarratano*, Chief Justice Rehnquist speaking for the plurality of the Court, concluded that neither the Eighth Amendment nor due process require a state to appoint counsel to assist death-sentenced inmates in state collateral review. 109 S.Ct. at 2771.

McFarland relies on Justice Kennedy's concurrence and the dissent in *Giarratano* for the proposition that a failure to provide indigent capital habeas petitioners with appointed counsel violates their constitutional right of access to the courts. McFarland's reliance is misplaced. In Texas, the initiation of state habeas proceedings by a death-sentenced inmate is triggered by the setting of an execution date. At that time, counsel is either appointed by the trial court² or recruited by the Texas Resource Center to assist the inmate in state habeas review. In his dissent in *Giarratano*, Justice Stevens noted that, of the 37 States authorizing capital punishment, 18 automatically provided indigent death row inmates with counsel to initiate their state habeas proceeding and 13, among these Texas, have governmentally funded resource centers to assist counsel in litigating capital cases. Representation is thus provided to Texas' death-sentenced inmates by either of the alternative methods approved by the dissent.

This is not a case in which there is no mechanism in place to provide counsel to a death sentenced inmate and, thus, does not raise the issue that McFarland argues was left open in *Giarratano*. McFarland's petition for certiorari review on direct appeal was filed on March 9, 1993, by Resource Center recruited counsel. Moreover, certiorari review was denied by the Court on June 6, 1993. The alleged inability to recruit counsel or itself provide representation to McFarland in state collateral review can only reflect, at best, the

² Article 1.051 (d) (3) of the Texas Code of Criminal Procedure provides as follows:

(d) An eligible indigent defendant is entitled to have the trial court appoint an attorney to represent him in the following appellate and post-conviction matters:

(3) a habeas corpus proceeding if the court concludes that the interests of justice require representation;

most abysmal lack of record keeping by the Texas Resource Center and a resulting failure to secure McFarland's easily anticipated need for representation. Alternatively, the alleged failure to recruit state habeas counsel can be understood by its consequences to be an attempt to manipulate the appearance of a crisis in representation when in fact none exists--a delay mechanism to the review process that should not be tolerated by the Court.

IV.

**McFARLAND HAS NOT SATISFIED THE
STANDARD FOR OBTAINING A STAY OF
EXECUTION.**

In deciding whether to grant a stay of execution, the Court is guided by the following standard:

"[T]here must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed."

Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983), quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers) (quoting *Times-Picayune Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974)). Because the federal constitutional issue raised by McFarland was not presented to the court below, the jurisdiction prerequisite for certiorari review is lacking. Moreover, the failure to appoint state habeas counsel does not implicate McFarland's constitutional right of access to the courts and thus, does not justify a stay.

V.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the application for stay be denied.

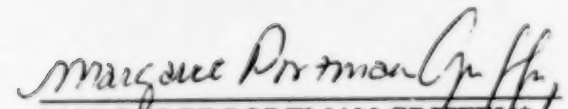
Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General for
Criminal Justice

ROBERT S. WALT
Assistant Attorney General
Chief, Capital Litigation Division


MARGARET PORTMAN GRIFFEY*
Assistant Attorney General
State Bar No. 08454460

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Facsimile No. (512) 463-2084

ATTORNEYS FOR RESPONDENT

*Counsel of Record

2B
X
DISTRIBUTED
NOV 19 1993

ORIGINAL

No. 93-6497

RECEIVED
HAND DELIVERED

NOV 19 1993

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FRANK BASIL McFARLAND,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

Respondent the State of Texas (the "State") fails to address directly the two factors that weigh most heavily in favor of granting the petition.

First, the Fifth Circuit's decision in this case is in direct conflict with the decision of the Ninth Circuit in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied, 111 S. Ct. 1778 (1992). The conflict goes far beyond a technical dispute over the wording of a statute -- these two circuits have entirely different approaches toward the role that counsel should play in the investigation and

1872

preparation of federal habeas claims. The Fifth and Ninth Circuits together account for 38 percent of the inmates currently on death row in the United States and 47 percent of all executions carried out since 1977.¹ As long as this conflict remains, the degree to which death row prisoners will have the assistance of counsel to prepare their federal habeas petitions will depend entirely upon the happenstance of the federal court to which they can make application. The State fails to mention this conflict (or even cite Brown).

Second, even if there were no clear-cut conflict among the lower courts, this case presents issues of such great importance that they warrant this Court's immediate attention. The overarching issue in this case is whether state death row prisoners can be executed before they have any meaningful opportunity to obtain counsel to assist them in the preparation of post-conviction petitions for relief. This case squarely presents the counterpoint to the facts that were critical to Justice Kennedy's concurrence in Murray v. Giarattano, 492 U.S. 1 (1989) -- i.e., that none of the death row prisoners involved in that case "has been unable to obtain counsel to represent him in post-conviction

¹ Death Row U.S.A., NAACP Legal Defense and Educational Fund (Fall 1993).

proceedings." 492 U.S. at 14 (Kennedy, J., concurring in judgment). Moreover, this case raises for the first time in this Court the issue of whether the right to counsel under federal statutory law extends to assistance in the investigation and preparation of federal habeas claims.²

These issues would be important even if they applied only to a single death row prisoner. But they do not. This case is the precursor to a potential tidal wave. An authoritative study done for the Texas state bar recently described the problem of finding counsel to represent death row prisoners in post-conviction proceedings in Texas as "desperate," due to an "overwhelming" number of cases and the increasing difficulty of finding volunteer counsel, "particularly when cases are under an active execution warrant."³ Several prisoners besides Mr. McFarland have execution dates set in the coming weeks and are likewise

² Given the extent to which state and federal habeas proceedings are intertwined, this petition and the petition in No. 93-6483, which addresses the failure of the State to provide Mr. McFarland with counsel in state habeas proceedings, raise closely related issues. Mr. McFarland suggests that both petitions be granted and the cases consolidated for purposes of briefing and oral argument.

³ A Study of Representation in Capital Cases in Texas, by the Spangenberg Group (hereinafter "Report") at ii-iii (1993) (attached to the Petition for Writ of Certiorari in No. 93-6483 as Appendix C).

without counsel.⁴ Thus, the issues raised by Mr. McFarland are "systemic," Report at xiii, and, until they are resolved, they will be presented repeatedly to this Court in petitions for certiorari and applications for stays of execution.

BACKGROUND

In view of certain statements made in the State's Opposition,⁵ it is important to set out clearly for the Court the context in which this case arises.

The evidence is overwhelming that there is a crisis in post-conviction representation in Texas. It is thoroughly documented in the Texas Bar study, which made several findings that are pertinent here:

⁴ See Letter of Mandy Welch to United States District Court for the Northern District of Texas, dated October 22, 1993, at 2.

⁵ This is not, as the State contends, a case in which there has been either "the most abysmal lack of record keeping" by the Texas Resource Center or "an attempt to manipulate the appearance of a 'crisis of representation' when in fact none exists" Br. Opp. at 17. The State cites to nothing to support these harsh allegations except the unremarkable facts that Mr. McFarland no longer has the lawyer he had on direct appeal, that Mr. McFarland has had occasional contacts with the Texas Appellate Defense and Educational Resource Center (the "Resource Center") and that several months have passed since this Court denied his certiorari petition. Id. Neither the district court nor the court of appeals relied in any way on the State's allegations, and therefore they have no place being asserted here.

- "the problems in Texas far outweigh those in any other death penalty state in the country" (Report at iii);
- "Texas has the largest death row population of any state in the country" (id. at iv);
- "the large number of cases with approaching dates of execution makes the problem most acute at this time" (id. at ii);
- "Texas is the only death penalty state in which representation in capital cases is provided almost exclusively by private counsel and primarily not by public defender programs" (id. at v);
- "Despite the fact that . . . the Code of Criminal Procedure in Texas gives the district court judges discretion to appoint counsel and to compensate them in state habeas proceedings, this is almost never done" (id. at vii) (emphasis added);
- "Texas is running out of volunteer lawyers and law firms willing to provide pro bono . . . representation in capital cases at state habeas" (id. at viii); and
- "[I]t is our professional view that representation in the state habeas cases in Texas has gone beyond the crisis level and requires immediate attention" (id. at ix).

This desperate situation has been several years in the making. Judge Edith Jones of the Fifth Circuit wrote in September 1990 that, while she had not to that point known of a defendant who was executed without the benefit of representation by counsel, "it must be recognized that the growing death row population requires increased counsel resources, while the present system discourages the appointment of counsel." Hon. Edith Jones, Death Penalty Proce-

dures: a Proposal for Reform, 53 Tex. Bar J. 850, 851 (1990). She noted that the State's practice of setting execution dates shortly after direct appeal is exhausted rarely provides enough time, on the first petition, "to permit preparation by defense counsel or thorough and adequate review by state and federal courts." Id. And she considered it "self-evident[]" that the State's failure to provide remuneration "discourages attorneys from representing capital defendants in the state habeas proceeding that is required before federal collateral review can be had." Id.

Thus, the fact that Mr. McFarland has been unrepresented since his certiorari petition was denied is a symptom both of the State's effort to impose what Judge Jones called "[d]ocket control by execution date," id., and the State's failure to provide any meaningful legal assistance in post-conviction proceedings. In the past, that failure was overcome by various stop-gap measures. The particular facts of Mr. McFarland's case, described below, demonstrate that such measures can no longer be counted upon to fill the gap.

This Court denied Mr. McFarland's petition for writ of certiorari on his direct appeal on June 7, 1993. McFarland v. Texas, 113 S. Ct. 2937 (1993). Two months

later (on August 16, 1993), the trial court set his execution for September 23. Mr. McFarland then filed a pro se petition with both the trial court and the Texas Court of Criminal Appeals asking that his execution be stayed so that the Resource Center would have sufficient time to recruit counsel. The trial court granted the request "in part" by rescheduling the execution date for October 27. Throughout this period, the Resource Center encountered the reality recognized by Judge Jones and documented in the Texas Bar study: Despite its best efforts, the Resource Center could not recruit counsel for a client who was facing imminent execution.⁶

Thus, on October 21, Mr. McFarland, with the assistance of the Resource Center, filed another pro se petition with both the state trial and appellate courts requesting a stay of sufficient duration "to ensure that I

⁶ The State implies that the Resource Center can and should assume the representation of all death row prisoners who do not otherwise have counsel. But the Resource Center is not a public defender service. While it has devoted some of its limited resources to the representation of death row prisoners, its principal functions are to recruit private attorneys and to provide legal and administrative support to those attorneys. See Report of the Judicial Conference of the United States to the House and Senate Judiciary Committees, 53 Crim. L. Rep. (BNA) 2003, 2013-14 (1993). It is not possible for the Resource Center to represent all of the more than 70 prisoners on Texas' death row who currently have no lawyer.

have meaningful access to legal representation"

That request was promptly denied by both courts. In dissent, Judge Clinton of the Texas Criminal Court of Appeals noted that it was time for the Texas courts to "confront headon 'the crisis stage in capital representation' in this State."⁷ A petition for writ of certiorari to the Texas Court of Criminal Appeals, a Motion to Stay Execution and a Motion to Proceed In forma Pauperis was filed with this Court in No. 93-6483 on October 25, 1993.

In the meantime, Mr. McFarland, with the assistance of the Resource Center, filed with the United States District Court for the Northern District of Texas on October 21 pro se motions for a stay of execution and appointment of counsel. The Resource Center submitted letters to the court again describing its efforts and inability to find counsel to represent Mr. McFarland. These motions were denied on October 25, two days before the scheduled execution, on the ground that the court had no jurisdiction to enter a stay or appoint counsel until a proceeding had been instituted by the filing of a habeas petition.

⁷ Ex Parte McFarland, Writ No. 25,518-01 (Tex. Crim. App., Oct. 22, 1993) (Clinton, J., dissenting) (attached to Motion to Supplement Appendix A of Petition in No. 93-6483).

On appeal, the Fifth Circuit, at approximately 6 p.m. on October 26, also denied relief, giving three principal grounds: (1) a stay cannot be issued under 28 U.S.C. § 2251 until a habeas petition is filed; (2) there is no constitutional right to a lawyer in post-conviction proceedings, and (3) in the absence of a habeas petition, Mr. McFarland had made no showing of a "substantial case on the merits," which it deemed a prerequisite to the issuance of a stay under Barefoot v. Estelle, 463 U.S. 880 (1983).⁸ A petition for writ of certiorari and application for stay were then lodged with this Court, which at 11:51 p.m. central time issued a stay pending action on the certiorari petition.

In the meantime, Danny D. Burns, a Fort Worth lawyer not recruited by the Resource Center, was contacted by district court personnel earlier in the day on October 26 and told that the court might grant a stay if he were to file a document denominated as a habeas corpus "petition" and agree to represent Mr. McFarland. Mr. Burns notified the Resource Center of this contact. Until that point, the

⁸ The Fifth Circuit failed to address Mr. McFarland's arguments that (1) the court had authority to issue a stay under 28 U.S.C. § 1651(a), the All Writs Act, and the U.S. Constitution; and (2) Mr. McFarland had a statutory right to counsel under 21 U.S.C. § 848(q)(4)(B).

Resource Center had advised Mr. McFarland against filing any kind of perfunctory "petition" designed merely to vest the court with jurisdiction because of the recent experience of another unrepresented death row inmate in Gosch v. Collins, No. SA-93-CA-731 (W.D. Tex.). In that case, the federal court in San Antonio had denied on the merits a perfunctory habeas petition that had been filed simply to eliminate any question that the court had jurisdiction to issue a stay⁹ and, in doing so, created the risk that any subsequent petition would be barred under Rule 9(b) of the Habeas Corpus Rules. To avoid such a result, the Resource Center advised Mr. McFarland to file a pre-petition motion for stay and appointment of counsel, a procedure that was objected to by the State of Texas but was approved by the Ninth Circuit in Brown v. Vasquez.

However, when it became apparent late on October 26 that there was a substantial risk that both the Fifth Circuit and this Court would fail to issue a pre-petition stay, Mr. Burns and the Resource Center decided that a perfunctory habeas petition might be Mr. McFarland's last chance. The court this time accepted jurisdiction but still

⁹ The Fifth Circuit affirmed that dismissal. That case is now before this Court on a petition for writ of certiorari in No. 93-6025.

denied the stay, finding that the perfunctory petition (not surprisingly) did not set forth a substantial case on the merits under Barefoot. On appeal, a divided panel of the Fifth Circuit issued a stay -- by coincidence at exactly the same minute as the stay issued by this Court in this case.

Two days later, Mr. Burns dismissed the habeas petition under Fed. R. Civ. P. 41(a), explaining that if Mr. McFarland proceeded on that petition, he would risk "being deprived of a meaningful opportunity to litigate all meritorious challenges to his conviction and death sentence not raised in the petition" Mr. McFarland has notified the Fifth Circuit of the dismissal, but he maintains that it did not moot the issues on appeal. On November 15, 1993, the State asked the Fifth Circuit to dismiss the appeal as moot.

This procedural history, while clearly tortured, hardly supports the State's suggestion that there has been an effort to manipulate the system. Instead, Mr. McFarland's three cases (No. 93-6483, No. 93-6497 and the case in which a habeas petition was filed, now pending in the Fifth Circuit) together graphically illustrate the procedural morass now being thrust upon litigants and the courts by the crisis in capital representation in Texas. Mr. McFarland submits that adoption here of the approach endorsed by the

Ninth Circuit in Brown v. Vasquez would cut through that morass. But, whether that approach is adopted or not, it should be apparent that this case raises important issues on which the lower federal courts need guidance from this Court.

I. REVIEW SHOULD BE GRANTED TO ELIMINATE CONFLICT.

The certiorari petition describes in some detail that the Fifth Circuit's decision here could not be more in conflict with the Ninth Circuit's decision in Brown. In addition, the Eleventh Circuit, in In re Lindsey, 875 F.2d 1518 (11th Cir. 1989), has decided a closely related issue that puts that circuit in apparent conflict with the Ninth Circuit as well.¹⁰ Thus, the three federal circuits with the largest death row populations are split 2-1 on the fundamental issue of whether the federal stay and appointment-of-counsel statutes can be invoked before a federal habeas petition is filed.

¹⁰ In that case, the court did not address the precise issue decided in Brown and in this case -- whether a death row prisoner could invoke § 2251 to obtain a stay before filing a habeas petition. But it did address whether counsel could be appointed under 21 U.S.C. § 848(q)(4)(B) to assist in the preparation of a habeas petition that had not yet been filed. The court read that statute in the same narrow way that the Fifth Circuit here interpreted § 2251, ruling that a habeas petition -- the very pleading the prisoner said he needed to assistance of counsel to prepare -- had to be filed first.

The different interpretations given to these statutes in these circuits result in profound differences in the quality and quantity of legal representation available to death row prisoners in these circuits. However the Court might feel about how this conflict should be resolved, it is clear that it requires resolution. Federal courts should not continue to dispense fundamentally different justice depending upon where they sit.

II. REVIEW SHOULD BE GRANTED TO DECIDE IMPORTANT ISSUES OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Even if no conflict between circuits existed, the Fifth Circuit's decision in this case raises important questions that this Court should resolve. The Fifth Circuit's decision has far broader implications for the administration of federal habeas than appears on the face of the narrowly drawn decision. If that decision is left in place, the issue of whether executions should be stayed so that meaningful assistance of counsel can be obtained will not go away.

If an unrepresented prisoner cannot obtain counsel and a stay of execution from a federal court before a habeas petition is filed, his only other choice is to attempt to file such a petition and then request a stay and the assis-

tance of counsel. Compare Br. Opp. at 11. There can be little question that such a "petition" would have to be perfunctory. Mr. McFarland has stated in this case that he "lack[s] the training and knowledge" to file a habeas petition -- a fact that would apply to virtually all death row prisoners. See Giarratano, 492 U.S. at 14 (Kennedy, J., concurring) ("[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law").

Until recently, the Texas Resource Center has responded to the State's assertion that a habeas petition is necessary to give a federal court jurisdiction to issue a stay by filing on behalf of unrepresented prisoners a perfunctory petition with the stay application. If such a petition were filed, then the State would agree not to object to the issuance of a stay. The federal judges in Texas then would routinely grant stays for a reasonable period (typically 120 days) to give the petitioners an opportunity for counsel to be recruited and to investigate their cases.¹¹ At the completion of the investigation, coun-

¹¹ See, e.g., Sterling v. Collins, No. 3-93CV0147-G (N.D. Tex., Jan. 22, 1993); Hernandez v. Collins, No. CA-L-92-11 (S.D. Tex., Aug. 20, 1992); Mooney v. Collins, No. (continued...)

sel would be given leave to amend the perfunctory petition to add all meritorious claims.

This stop-gap arrangement was upset in the Gosch case mentioned above, when the district court there, despite the state's lack of objection, reviewed and dismissed the perfunctory petition on its merits and denied a stay on the eve of the petitioner's execution. The Fifth Circuit affirmed that dismissal. And the Fifth Circuit's decision in this case, while not addressing exactly the same issue, lends further weight to the conclusion that a stay of execution to allow time for counsel to be obtained and to investigate the case will not be granted unless the petitioner can somehow put together on his own not just a perfunctory habeas petition but one that asserts a substantial case on the merits. Moreover, under the Gosch approach, if the unrepresented petitioner's initial habeas petition is dismissed but he somehow escapes the executioner long enough to find a lawyer and file a new petition, it too will be dismissed, this time as an abuse of the writ under McClesky -- no matter how meritorious its claims might be.

¹¹(...continued)
6:92CV254 (E.D. Tex., Apr. 30, 1992); Caldwell v. Collins, No. 3-92CV1316-P (N.D. Tex., June 30, 1992).

Procedures this Byzantine and results this perverse on their face raise questions regarding whether they are permitted by the Constitution or were intended by Congress. While this Court has stated that a death row prisoner has no constitutional right to counsel in most post-conviction proceedings,¹² it has also said that such prisoners do have a constitutional right to "meaningful access" to such proceedings.¹³ Moreover, Congress has created a statutory right to counsel in federal habeas cases, a factor that this Court has never before considered. Given this legal backdrop, the execution of a death row prisoner -- before he has even had any meaningful assistance of counsel to determine whether he has valid post-conviction claims -- raises issues so fundamental and novel that they warrant review by this Court.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and in this Reply, Petitioner Frank Basil

¹² See, e.g. Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991); but see id. at 2567-68.

¹³ Bounds v. Smith, 430 U.S. 817 (1977).

Farland respectfully requests that the Petition be granted.

Respectfully submitted,

FRANK BASIL McFARLAND

By: Mandy Welch *by express permission*

* Mandy Welch
Joe Margulies
Brent E. Newton
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
fax (713) 522-2733

Brent E. Newton

Temporary counsel for
Petitioner

* Counsel of Record

RECEIVED
HAND DELIVERED

NOV 19 1993

OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I hereby certify, as a member of the Bar of the Court, that all parties required to be served have been served one copy of the foregoing Petitioner's Reply Brief (in No. 93-6497) by first class mail, postage prepaid, to wit:

Margaret Portman Griffey
P. O. Box 12848, Capitol Station
Austin, Texas 78711
(512) 463-2080

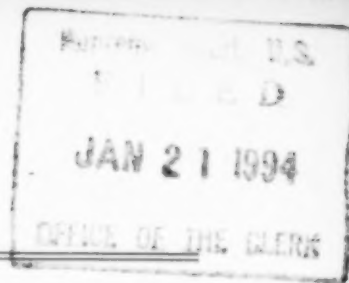
Counsel of Record for Respondent

Mandy Welch by request
permission

Dated: November 19, 1993

Brent
Newton

(1)
No. 93-6497



In The
Supreme Court of the United States
October Term, 1993

FRANK B. McFARLAND,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

MANDY WELCH
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
Counsel for Petitioner

MARGARET P. GRIFFEY
Assistant Attorney General
of Texas
P.O. Box 12548,
Capitol Station
Austin, Texas 78711
(512) 463-2080
Counsel for Respondent

Petition For Writ Of Certiorari Filed October 26, 1993
Writ Of Certiorari Granted November 29, 1993

TABLE OF CONTENTS

	Page
Relevant docket entries from <i>McFarland v. Collins</i> , No. 4:30-CV-714-A (N.D. Tex. 1993)	1
Letter from Hon. Don Leonard, Judge, Criminal Court No. 3 of Tarrant County, Texas, to Frank McFarland, enclosing Order Setting Execution Date (August 16, 1993)	3
Letter from Eden Harrington, Esq., to Judge Leonard, enclosing a Proposed Order to With- draw Execution Date (Sept. 19, 1993)	6
Order Modifying Execution Date (Sept. 20, 1993)	12
Letter from Judge Leonard to Frank McFarland (Sept. 27, 1993)	13
State of Texas' Death Warrant for Frank Basil McFarland (Sept. 29, 1993)	14
Letter from Mandy Welch, Esq., to Judge Leonard (Oct. 16, 1993), enclosing Proposed Order to Withdraw Execution Date	16
Motion to Stay Execution Date to Allow Defen- dant to Obtain an Attorney to Prepare and File a Post-Conviction Application for Writ of Habeas Corpus, Texas Court of Criminal Appeals, n.d.	21
Letter from Mandy Welch to Judges of the Texas Court of Criminal Appeals (Oct. 21, 1993)	24
Order denying Motion for Stay of Execution, Texas Court of Criminal Appeals (Oct. 22, 1993)	39

TABLE OF CONTENTS - Continued

	Page
Petitioner's <i>Pro Se</i> Motion for Stay of Execution and Request for Appointment of Counsel, N.D. Tex. (Oct. 22, 1993).....	41
Letter from Mandy Welch to the U.S. District Court, N.D. Tex. (Oct. 22, 1993).....	46
Letter from Mandy Welch to Hon. John H. McBryde, United States District Judge (Oct. 24, 1993).....	72
Order denying Motion for Stay of Execution, Texas Court of Criminal Appeals (Oct. 22, 1993)	75
Order denying Motion for Stay of Execution and Appointment of Counsel, N.D. Tex. (Oct. 25, 1993).....	76
Application for Certificate of Probable Cause and Motion for Stay of Execution, U.S. Ct. App., 5th Cir. (Oct. 26, 1993)	79
<i>Per Curiam</i> Decision Granting <i>In Forma Pauperis</i> status but Denying a Certificate of Probable Cause and Motion for Stay of Execution, U.S. Ct. App., 5th Cir. (Oct. 26, 1993).....	81
Affidavit of D'lene Tanner, Felony Appeals Clerk for the District Court of Tarrant County	89
Affidavits of Edward L. Wilkenson, Charles Malin, and Betty Marshall	91
Affidavit of Thomas Lowe	98
Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, November 29, 1993.....	99

RELEVANT DOCKET ENTRIES

U.S. District Court
Northern District of Texas (Fort Worth)

CIVIL DOCKET FOR THE CASE #: 93-CV-714

- 10/22/93 1 MOTION by Frank Basil McFarland to proceed in forma pauperis
- 10/22/93 2 MOTION by Frank Basil McFarland to stay execution, and for appointment of counsel
- 10/25/93 3 ORDER denying [2-1] motion to stay execution, denying [2-2] motion for appointment of counsel, denying [1-1] motion to proceed in forma pauperis (signed by Judge McBryde)
- 10/26/93 4 Pro Se Application by Frank Basil McFarland for certificate of probable cause to authorize appeal and certification that appeal is in good * * * STRICKEN PER ORDER FILED 10/26/93 * * *
- 10/26/93 5 MOTION by Frank Basil McFarland for leave to proceed in forma pauperis on appeal
- 10/26/93 6 NOTICE OF APPEAL by Frank Basil McFarland from Final Judgment and Order denying Petitioner's stay of execution and refusing to appoint counsel.

10/26/93 7 ORDER denying motion for leave to proceed in forma pauperis on appeal, striking application for certificate of probable cause to authorize appeal and certification that appeal is in good faith (signed by Judge McBryde)

[Seal]

Don Leonard
District Judge
Criminal District Court No. 3
Tarrant County Justice Center
Fort Worth, Texas 76196-0215

August 16, 1993

Mr. Frank Basil McFarland
Ellis I Unit, Route 6
Huntsville, Texas 77343

Dear Sir:

Enclosed you will find a certified copy of this Court's order of August 16, 1993.

Please note that the order sets your execution date for September 23, 1993.

Sincerely,

/s/ Don Leonard
JUDGE, Criminal District
Court #3

Encl.

cc: S. O. Woods, Director
Records and Classifications
P. O. Box 99
Huntsville, Texas 77340

Andrea L. March
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711

Tim Curry, District Attorney
401 W. Belknap
Fort Worth, Texas 76196-0201

Thomas Lowe, Clerk
Court of Criminal
Appeals
P. O. Box 12308
Austin, Texas 78711

Jack Strickland
Defense Attorney
909 Throckmorton St.
Fort Worth, Texas
76102

IN CRIMINAL DISTRICT
COURT NUMBER THREE OF
TARRANT COUNTY, TEXAS
NO. 0336837D

THE STATE OF TEXAS §
VS. §
FRANK BASIL MCFARLAND §

ORDER SETTING EXECUTION

The Texas Court of Criminal Appeals having affirmed Defendant's conviction on September 23, 1992, and mandate having issued on March 12, 1993, and mandate having been received from the Court of Criminal Appeals in the above styled and numbered cause, the Court now enters the following order:

IT IS ORDERED that the Defendant, Frank Basil McFarland, who has been adjudged to be guilty of Capital Murder as charged in the indictment and whose punishment has been assessed by the verdict of the jury and judgment of the Court at Death, shall be kept in custody by the Director of the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, until Thursday, the 23rd day of September, 1993, upon which day, at the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, at some hour before sunrise, in a room arranged for the purpose of execution, the Director, acting by and through the executioner designated by the Director as provided by law, is commanded to carry out this sentence of death by intravenous injection of a substance or substances in a lethal

quantity sufficient to cause the death of Frank Basil McFarland and until Frank Basil McFarland is dead, such procedure to be determined and supervised by the Director of the Institutional Division of the Texas Department of Criminal Justice.

The Clerk of this Court shall issue and deliver to the Sheriff of Tarrant County, Texas, a certified copy of this order and a Death Warrant in accordance with this Order, directed to the Director of the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, commanding the Director to put into execution the Judgment of Death against Frank Basil McFarland.

The Sheriff of Tarrant County, Texas, is Ordered, upon receipt of the Death Warrant, to deliver the Death Warrant and a certified copy of this order to the Director of the Institutional Division of the Texas Department of Criminal Justice, Huntsville, Texas.

SIGNED AND ENTERED this 16th day of August, 1993.

/s/ Don Leonard
JUDGE PRESIDING,
Criminal District Court
Number Three of
Tarrant County, Texas

Texas Resource Center

September 19, 1993

Hon. Don Leonard
District Judge
Criminal District Court No. 3
Justice Center
401 Belknap St.
Fort Worth, Texas 77701

Re: Ex Parte Frank Basil McFarland

Dear Judge Leonard:

I am writing you regarding Frank McFarland's *pro se* motion asking this Court to stay or withdraw his current execution date of September 23, 1993, so that he can obtain counsel to represent him in a post-conviction habeas corpus proceeding. At Mr. McFarland's request, the Center has agreed to recruit counsel for his post-conviction appeals, but have not, as yet, been able to do so.

As you know, the purpose of the Texas Resource Center is to ensure that indigent death row inmates in Texas have legal representation in state and federal habeas corpus appeals. The Center accomplishes this primarily by recruiting attorneys from the private bar to represent indigent death row inmates in these appeals and by consulting with and assisting those attorneys. So that we can recruit counsel for Mr. McFarland, I urge you to withdraw his execution date, allow us sufficient time for to recruit counsel, and grant new counsel an additional 120 days to investigate, research, prepare and file

an Article 11.07 habeas application. Given the nature and amount of work required to prepare a proper Article 11.07 application and the fact that few private attorneys would be able to devote 100% of their time to the case because of other obligations, 120 days is imminently reasonable.

The Center will make every effort to recruit counsel for Mr. McFarland as soon as possible. Given the current number of death row inmates without counsel and the posture of those cases relative to Mr. McFarland's, I estimate that it will take a [sic] least 120 days from this date to do so. As noted below, Mr. McFarland is one of many who need representation, and his case cannot fairly be moved to the top of the recruiting list when so many others are in need of counsel and similarly situated. In the event counsel is recruited sooner, I will immediately notify the Court—

Alternatively, I urge you to withdraw the date, appoint and agree to pay counsel to represent Mr. McFarland in a habeas proceeding, and give that counsel 120 days in which to file the Article 11.07 application. Of Course, the Center would be available to consult with and assist appointed counsel.

The Center is mindful of the fact that in the past some district attorneys have suggested that our request for time to recruit counsel for state habeas proceedings is unnecessary and made merely as a delaying tactic. This is simply not true. To the contrary, representation of death row inmates in habeas proceedings is in a state of crisis because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row

inmates needing post-conviction representation is substantially increasing each year; and (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these cases is decreasing. This crisis in capital representation was the subject of a recent study commissioned by the Texas Bar Association:

We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty.

[T]he results of our study disclose that the situation in Texas can only be described as desperate. The volume of cases is overwhelming. Presently no funds are allocated for payment of counsel or litigation expenses at the state habeas level. Recruiting efforts for volunteer attorneys coordinated by the State Bar of Texas and the Texas Resource Center have been substantial, but the number of available attorneys and firms remains limited. In the long run, the problem in Texas cannot and will not be solved by a voluntary program. Many lawyers are reluctant to take cases which invariably require an enormous personal sacrifice without compensation. Other lawyers refuse to take additional cases after having experienced a whole range of problems with their most recent case or cases. Moreover, most lawyers are reluctant to participate because of the substantial complexity of the law. Finally, the large number of cases with approaching dates of execution makes the problem most acute at this time.

A Study of Representation of Capital Cases in Texas, by the Spangenberg Group, at i-ii (emphasis added).

Presently, there are approximately *seventy* unrepresented inmates on Texas' death row who are in the post-conviction stage, and the numbers are increasing at a record pace. The convictions and sentences of thirteen of those unrepresented inmates were affirmed by the Court of Criminal Appeals before Mr. McFarland's. When Mr. McFarland's execution date was scheduled, the Center was already facing imminent executions scheduled for six other unrepresented inmates.

The existence of an imminent execution date makes it virtually impossible to recruit an attorney. Few attorneys will consider taking a case without an assurance that they can become familiar with the case and provide adequate representation before being faced with an execution date. For this reason, in lieu of setting execution dates, the Center has been urging courts to enter scheduling orders specifying the recruiting deadline and providing a later deadline for the filing of an application. In almost all cases in which this has happened, the Center has met the recruitment deadline and the recruited attorney has met the filing deadline. The Center has not previously requested a scheduling order in Mr. McFarland's case because we were not notified of the sentencing hearing and only learned of the September 23rd execution date in a letter from Mr. McFarland after the court's order was entered.

I apologize to the Court for not providing the information in this letter immediately upon learning of the September 23 execution. Our delay in contacting the court was caused by the fact that the attorneys who handle recruitment and the problems of unrepresented death row inmates were dealing with numerous crises

during the first three weeks in September, including the scheduled executions for several other unrepresented inmates.

Again, I urge you to withdraw your order setting Mr. McFarland's September 23rd execution date and enter a scheduling order that allows 120 days for the recruitment of an attorney and an additional 120 days within which to file a state habeas application. This Court clearly has the power to do so under Art. 5, § 8 of the Texas Constitution. The previously stated position of the Tarrant County district attorney's office that the court can't withdraw an execution date in the absence of the filing of a state habeas petition ignores the Court's inherent jurisdiction over its orders, conflicts with the practices of trial courts all over this state, and is just wrong.

I or another attorney with our office will be happy to discuss our efforts to recruitment [sic] an attorney for Mr. McFarland with you and the district attorney either in person or by telephone. Also, I would appreciate your notifying me of the setting of Mr. McFarland's motion for hearing.

Sincerely,

/s/ Eden Harrington
Eden Harrington
Executive Director

cc: District Attorney,
Tarrant County
William Zapalac,
Assistant Attorney General

IN CRIMINAL DISTRICT COURT NO. 3
OF TARRANT COUNTY, TEXAS

EX PARTE FRANK
BASIL McFARLAND

Petitioner.

Case No. ____

ORDER

The motion to withdraw execution date and to permit the Texas Resource Center to locate new counsel to represent Frank McFarland in post-conviction proceedings having been heard and duly considered, it is hereby GRANTED, and ordered that:

1. The execution date of September 23, 1993 is hereby withdrawn;

2. The Texas Resource Center is granted one hundred twenty days in which to recruit new counsel to represent Frank McFarland in post-conviction proceedings. The Resource Center will immediately notify this Court when new counsel is located. New counsel will file a petition for writ of habeas corpus on behalf of Mr. McFarland within one hundred twenty days after notification of recruitment is filed with the Court.

DISTRICT JUDGE

IN THE CRIMINAL DISTRICT
COURT NUMBER THREE OF
TARRANT COUNTY, TEXAS
No. 0336837D

(Caption Omitted In Printing)

ORDER MODIFYING EXECUTION DATE

Having received the application to modify execution in the instant case, this Court is of the opinion that it should be granted in part.

Therefore, this Court now modifies its previous [sic] order of August 17, 1993, setting execution date for September 23, 1993. IT IS NOW ORDERED that the death warrant issued pursuant to the August 17, 1993 order be in all things recalled. IT IS FURTHER ORDERED that FRANK BASIL McFARLAND be put to death by an executioner designated by the director of the Texas Department of Criminal Justice, Institutional Division, before the hour of sunrise on Wenesday, [sic] October 27, 1993.

IT IS ORDERED that the Clerk of the Court shall issue a death warrant in accordance with this order and deliver it ti [sic] the Director of the Texas Department of Criminal Justice, Institutional Division, at Huntsville, Texas.

SIGNED AND ENTERED this 20th day of September, 1993.

/s/ Illegible
JUDGE PRESIDING

[SEAL]

Don Leonard
District Judge
Fort Worth, Texas 76196-0215

September 27, 1993

Mr. Frank Basil McFarland
Ellis I Unit, Route 6
Huntsville, Texas 77343

Dear Sir:

Enclosed you will find a certified copy of this Court's order of September 20, 1993.

Please note that the order sets your execution date for October 27, 1993.

Sincerely,

/s/ Don Leonard
JUDGE, Criminal District
Court #3

Encl.

cc: S. O. Woods, Director	Thomas Lowe, Clerk
Records and Classifications	Court of Criminal
P. O. Box 99	Appeals
Huntsville, Texas 77340	P. O. Box 12308
Andrea L. March	Austin, Texas 78711
Assistant Attorney General	Texas Resource Center
P. O. Box 12548	Defense Attorneys
Austin, Texas 78711	3223 Smith, Suite 215
Tim Curry, District Attorney	Houston, Texas 770066
401 W. Belknap	
Fort Worth, Texas 76196-0201	

THE STATE OF TEXAS § CRIMINAL DISTRICT
 VS. NO. 0336837D § COURT NO. THREE
 § TARRANT COUNTY,
FRANK BASIL § TEXAS
MCFARLAND

DEATH WARRANT

To the Director of The Institutional Division Texas Department of Criminal Justice, or in case of his death, disability or absence, the Warden of the Huntsville Unit of the Institutional Division Texas Department of Criminal Justice or in the event of the death or disability or absence of both the Director of the Institutional Division Texas Department Of Criminal Justice and the Warden of the Institutional Division Texas Department Of Criminal Justice, to such person appointed by the Board of Directors of the Institutional Division Texas Department Of Criminal Justice, Greetings:

Whereas, on the 13TH day of NOVEMBER, A.D. 1989 in the CRIMINAL District Court No. THREE of Tarrant County, Texas, FRANK BASIL MCFARLAND was duly and legally convicted of the crime of Capitol Murder, as fully appears in the judgment of said Court entered upon the minutes of said court as follows, to-wit: Judgment attached and,

Whereas, on the 15TH day of NOVEMBER, A.D., 1989 the said Court pronounced sentence upon the said FRANK BASIL MCFARLAND in accordance with said said [sic] judgment fixing the time for the execution of the said FRANK BASIL MCFARLAND for before the hour of sunrise on WEDNESDAY, the 27TH day of OCTOBER, A.D., 1993-as fully appears in the sentence of the Court

and entered upon the minutes of said Court as follows, to-wit: Sentence attached.

These are therefore to command you to execute the aforesaid judgment and sentence any time before the hour of sunrise on the 27TH day of OCTOBER, A.D., 1993 by intravenous injection of substance or substances in a lethal quantity sufficient to cause death and until the said FRANK BASIL MCFARLAND is dead.

Herein fail not, and due return make hereof in accordance with law.

Witness my signature and seal of office on this the 29TH day of SEPTEMBER, A.D., 1993.

Issued under my hand and seal of Office in the City of Fort Worth, Tarrant County, Texas this 29th day of SEPTEMBER, 1993.

THOMAS P. HUGHES,
 CLERK OF THE DISTRICT
 COURTS OF
 TARRANT COUNTY, TEXAS

BY: Illegible
 Deputy

Texas Resource Center

October 16, 1993

Hon. Don Leonard
District Judge
Criminal District Court No. 3
Justice Center
401 Belknap St.
Fort Worth, Texas 77701

Re: *Ex Parte Frank Basil McFarland*

Dear Judge Leonard:

As you know, Mr. McFarland's execution was previously scheduled to occur on September 23, 1993. On September 20, 1993, Mr. McFarland filed a *pro se* motion informing the court of his desire to pursue relief in an Article 11.07 proceeding and his need for counsel and asking the court to withdraw or modify the order scheduling the execution so that the Texas Resource Center could recruit counsel. By letter dated September 19, 1993, Eden Harrington informed you that the Texas Resource Center had agreed to recruit habeas counsel for Mr. McFarland and urged you to grant Mr. Farland's motion. Ms. Harrington explained in her letter that an imminent execution date makes it virtually impossible for us to recruit *pro bono* counsel unless there is an assurance that the court will give recruited counsel sufficient time to review the record, investigate potential claims and prepare a proper habeas application. Additionally, Ms. Harrington explained that because of the large number of inmates needing state habeas counsel, the Center urges the Court to grant 120 days to recruit counsel and an

additional 120 days for recruited counsel to prepare and file an 11.07 application.

On September 20, 1993, in your absence, Judge Drago modified Mr. McFarland's execution date to October 27, 1993 in order to permit you to consider and rule on the Center's request and Mr. McFarland's motion. As the new executive director of the Resource Center, I am writing to you to reaffirm our willingness to recruit counsel for Mr. McFarland and to explain our need for additional time.

At this time despite our best efforts, we have been unable to secure counsel for Mr. McFarland. This lack of success is not surprising. Ms. Harrington explained the recruiting difficulties caused by imminent execution dates in detail in page three of her letter to you. Simply put, no competent lawyer will take on a highly complex case *pro bono*, where literally, life is at stake, without adequate time to prepare it. Her letter also accurately described the enormous gap between demand for volunteer counsel at the state habeas level and the supply of lawyers willing to undertake these cases *pro bono*. There is no realistic prospect of success of recruiting counsel for Mr. McFarland so long as he continually faces an execution date less than a month away and there are no assurances that recruited counsel will be given sufficient time to prepare a proper habeas petition.

However, given enough time, there is good reason to believe that we will be able to recruit counsel for Mr. McFarland. In the brief time since his date was modified, the Center has successfully recruited state habeas counsel for an inmate where the district attorney's office had

agreed to work out a filing schedule with recruited counsel and federal habeas counsel in a case where the federal court had granted sufficient time for recruited/appointed counsel to file a federal habeas petition.

Understandably, Judge Drago was unwilling to do more than modify Mr. McFarland's date to allow you the opportunity to fully consider this situation and decide on an appropriate course of action. I hope that you will seriously consider entering a scheduling order granting the Center 120 days to recruit counsel for Mr. McFarland and allowing recruited counsel 120 days to review the record, investigate the case, and file the state habeas application.

It is important to note that as the number of unrepresented inmates continues to grow, it is becoming increasingly difficult to find volunteer counsel to represent capital defendants in state habeas proceedings. More frequently, lawyers are willing to take these cases only if they can be appointed and paid. For this reason we are able recruit attorneys for federal court more quickly and more easily than we can for state court. If we were assured that the Court would exercise is [sic] discretionary power to appoint and pay counsel at a reasonable hourly rate, the difficulties recruiting counsel would be substantially reduced. In either event, new counsel will need approximately 120 days in which to prepare and file the state habeas petition to ensure that all available claims are properly raised.

We again urge you to consider and grant Mr. McFarland's *pro se* motion and enter an order that ensures him the assistance of counsel and one meaningful opportunity

to challenge his conviction and sentence in state habeas proceedings. We do this not as his counsel, but to bring the issue before the Court for your consideration in a reasonable way. A proposed order is enclosed for your consideration.

The Center will continue to assist the Court with this process. I or another attorney with our office will be happy to discuss our efforts to recruit an attorney for Mr. McFarland with you and a representative of the district attorney either in person or by telephone. Also, I would appreciate your notifying me of the setting of any motions regarding Mr. McFarland's execution date. Thank you.

Sincerely,

/s/ Mandy Welch
Mandy Welch
Executive Director

cc: District Attorney,
Tarrant County
Peggy Griffey
Assistant Attorney General

IN CRIMINAL DISTRICT COURT NO. 3
OF TARRANT COUNTY, TEXAS

EX PARTE	:	
FRANK BASIL McFARLAND	:	Case No. 0336837D
Petitioner.	:	

ORDER

The motion to withdraw execution date and to permit the Texas Resource Center to locate new counsel to represent Frank McFarland in post-conviction proceedings having been heard and duly considered, it is hereby GRANTED, and ordered that:

1. The execution date of October 15, 1993 is hereby withdrawn;
2. The Texas Resource Center is granted one hundred twenty days in which to recruit new counsel to represent Frank McFarland in post-conviction proceedings. The Resource Center will immediately notify this Court when new counsel is located. New counsel will file a petition for writ of habeas corpus on behalf of Mr. McFarland within one hundred twenty days after notification of recruitment is filed with the Court.

DISTRICT JUDGE

IN THE TEXAS COURT OF CRIMINAL
APPEALS IN AUSTIN, TEXAS

Ex Parte)	
FRANK BASIL McFARLAND)	No. <u>71,016</u>
Petitioner)	

MOTION TO STAY EXECUTION DATE TO ALLOW
DEFENDANT TO OBTAIN AN ATTORNEY TO
PREPARE AND FILE A POST-CONVICTION
APPLICATION FOR WRIT OF HABEAS CORPUS

Frank Basil McFarland respectfully moves this Court to stay the order of Criminal District Court No. 3 setting my execution for October 27, 1993. I also ask the Court to enter an order remanding the case to the district court with instructions to allow me time for the Texas Resource Center to recruit an attorney to represent me and sufficient time thereafter for my attorney to prepare and file a post-conviction application for writ of habeas corpus pursuant to Texas Code of Criminal Procedure Article 11.07, or to appoint counsel for me.

In support of this motion, I state the following:

1. I was represented at trial by Tolly Wilson and Sharen Wilson. I was represented on direct appeal by Jack V. Strickland and in the Supreme Court by Isaiah S. Gant. Mr. Gant's representation was limited to my certiorari proceedings, and I now have no legal counsel. I have asked the Texas Resource Center (hereafter called "Center") to recruit new counsel for me.

2. On September 20, 1993, my execution date was modified from September 23, 1993 to the present date to give the judge of the trial court an opportunity to consider my request for a stay. While I appreciate that modification, it has ~~not allowed sufficient time for a lawyer to~~ be found for me. So far, the trial court has refused to stay or modify my execution date to allow sufficient time for counsel to be recruited for me.

3. I wish to seek post-conviction relief pursuant to Article 11.07 of the Texas Code of Criminal Procedure, and I need counsel to represent me. I cannot file an application for post-conviction habeas corpus relief because I lack the resources, training and knowledge to do so. The Center, at my request, is attempting to recruit counsel for such proceedings. An attorney from the Center assisted me in preparing this motion. A letter from Mandy Welch, Executive Director of the Texas Resource Center, informing the Court of the Center's recruitment efforts accompanies this motion as Appendix A. I ask the Court to give the Center the time Ms. Welch requests in the letter to recruit a lawyer for me.

4. For the reasons stated above, I respectfully urge this Court to grant this motion to ensure that I have meaningful access to legal representation in all available appeals before I am executed.

Respectfully submitted,

/s/ Frank B. McFarland
FRANK BASIL McFARLAND
Ellis I Unit
T.D.C.J. I.D. #963
Huntsville, TX 77343

Certificate of Service

I certify that an [sic] true and correct copy of foregoing motion was deposited with Federal Express on October 2nd, 1993 for delivery to the Tarrant County District Attorney's Office, 401 West Belknap Street, Fort Worth, Texas 76196.

/s/ Mandy Welch

Texas Resource Center

October 21, 1993

Texas Court of Criminal Appeals
201 West 14th Street
Austin, Texas 78701

Re: *Ex Parte Frank Basil McFarland*

Honorable Judges of the Court:

I am writing you regarding Frank McFarland's *pro se* motion asking this Court to stay his current execution date of October 27, 1993, so that he can obtain counsel to represent him in a post-conviction habeas corpus proceeding. At Mr. McFarland's request, the Texas Resource Center has agreed to recruit counsel for his post-conviction appeals, but has not, as yet, been able to do so. As the new executive director of the Resource Center, I am writing to you to report on the status of our effort to recruit counsel for Mr. McFarland's post-conviction appeals.

The Center, through letters to the district court, encouraged Judge Leonard of the trial court to enter scheduling orders rather than use execution dates to govern the progress of Mr. McFarland's case. Copies of those letters are attached. On September 20, a visiting judge modified Mr. McFarland's then-existing date by somewhat more than thirty days to the present date to enable Judge Leonard, who was out-of-town, to consider and rule on Mr. Farland's motion. This week, Judge Leonard

denied Mr. McFarland's request that his date be withdrawn or modified to enable him to obtain an attorney.

The Center has not yet secured counsel for Mr. McFarland for several reasons. First and foremost, the presence of an imminent execution date makes it virtually impossible to recruit counsel for him. Few attorneys will consider taking a case *pro bono* without an assurance that they will have time to become familiar with it and provide adequate representation before their client is executed. For this reason, in lieu of setting an execution date, the Center urges district judges to enter scheduling orders specifying the recruiting deadline and providing a later deadline for the filing of an application. In most cases in which this has happened, the Center has met the recruitment deadline and the recruited attorney has met the filing deadline.

In addition, the Center is facing the greatest crisis of unrepresented death row inmates since its inception. This crisis has come about because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row inmates needing post-conviction representation is substantially increasing each year; (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these cases is decreasing; and (4) setting of execution dates for unrepresented inmates substantially decreases the Center's ability to recruit counsel.

Mr. McFarland's case is emblematic of the cases of many other unrepresented inmates on death row in

Texas. At present, seven inmates who have not yet pursued habeas corpus relief in any court and are unrepresented have execution dates before the end of the year. They are:

October 27	Frank McFarland (Tarrant County)
November 2	Kevin Zimmerman (Jefferson County)
November 3	Aaron Fuller (Dawson County)
November 10	Anthony Cook (Milam County)
November 18	Martin Vega (Caldwell County)
November 23	Michael Lockhart (Bexar County)
December 3	Orien Joiner (Lubbock County)

These men are among the approximately *seventy* unrepresented inmates on Texas, death row who are in the post-conviction stage, and the numbers are increasing at a record pace. The convictions and sentences of thirteen of those unrepresented inmates were affirmed by this Court before Mr. McFarland's. When Mr. McFarland's execution date was scheduled, the Center was already facing executions scheduled for six other unrepresented inmates.

Representation of Texas death row inmates was the subject of a recent study commissioned by the Texas Bar Association. That study discusses the Texas crisis at length:

We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty.

[T]he results of our study disclose that the situation in Texas can only be described as desperate. The volume of cases is overwhelming. Presently

no funds are allocated for payment of counsel or litigation expenses at the state habeas level. Recruiting efforts for volunteer attorneys coordinated by the State Bar of Texas and the Texas Resource Center have been substantial, but the number of available attorneys and firms remains limited. In the long run, the problem in Texas cannot and will not be solved by a voluntary program. Many lawyers are reluctant to take cases which invariably require an enormous personal sacrifice without compensation. Other lawyers refuse to take additional cases after having experienced a whole range of problems with their most recent case or cases. Moreover, most lawyers are reluctant to participate because of the substantial complexity of the law. Finally, the large number of cases with approaching dates of execution makes the problem most acute at this time.

A Study of Representation of Capital Cases in Texas, by the Spangenberg Group, at i-ii (emphasis added).

There is no realistic prospect of success in recruiting counsel for Mr. McFarland while he has a date a few days, a few weeks, or even a month away. Because of the present backlog of unrepresented inmates, a minimum of 120 days is necessary for a successful recruitment effort. An assurance that the judge will exercise his discretion to order payment of attorney fees at a reasonable rate would greatly increase the Center's ability to recruit qualified counsel.

I respectfully suggest that it is time, in view of the large number of unrepresented death row inmates, for the Court to seriously review the representation crisis in post-conviction proceedings in capital cases and its

approach to it. This matter can best be dealt with in Texas, by Texas courts, with this Court's leadership. The Center is ready and willing to work closely with this Court, district courts, the Attorney General's office, and district attorneys to create some procedure that will allow sufficient time to recruit counsel while also addressing legitimate concerns of judicial economy and the orderly progression of capital cases. The current problem will be difficult to resolve, but will only worsen with continuing inaction.

I urge the Court to stay Mr. McFarland's execution and to grant the Center 120 days to recruit counsel for him, order the district court to order payment of counsel at reasonable hourly rate, and allow recruited or appointed counsel 120 days in which to file a state habeas application. Doing so will promote the orderly workings of the criminal justice system in capital cases and help to ensure the reliability of the verdicts in which the death penalty is assessed.

The Resource Center will continue to assist the Court with the process of providing representation to death row inmates. I will be happy to discuss our efforts to recruit an attorney for Mr. McFarland with the court, the district attorney, and the Attorney General's office. I hope that we can work together to solve this representation

problem not only in Mr. McFarland's case, but in the cases of inmates similarly situated in the future.

Sincerely,

/s/ Mandy Welch
Mandy Welch
Executive Director

cc: District Attorney,
Tarrant County
Margaret Griffey
Assistant Attorney General

Texas Resource Center

September 19, 1993

Hon. Don Leonard
District Judge
Criminal District Court No. 3
Justice Center
401 Belknap St.
Fort Worth, Texas 77701

Re: *Ex Parte Frank Basil McFarland*

Dear Judge Leonard:

I am writing you regarding Frank McFarland's *pro se* motion asking this Court to stay or withdraw his current execution date of September 23, 1993, so that he can obtain counsel to represent him in a post-conviction habeas corpus proceeding. At Mr. McFarland's request, the Texas Resource Center has agreed to recruit counsel for his post-conviction appeals, but have not, as yet, been able to do so.

As you know, the purpose of the Texas Resource Center is to ensure that indigent death row inmates in Texas have legal representation in state and federal habeas corpus appeals. The Center accomplishes this primarily by recruiting attorneys from the private bar to represent indigent death row inmates in these appeals and by consulting with and assisting the attorneys. So that we can recruit counsel for Mr. McFarland, I urge you to withdraw his execution date, allow us sufficient time to recruit counsel, and grant new counsel at least 120 days to investigate, research, prepare and file an Article 11.07 habeas application. Given the nature and amount of

work required to prepare a proper Article 11.07 application and the fact that few private attorneys will be able to devote 100% of their time to the case, 120 days is imminently reasonable.

The Center will make every effort to recruit counsel for Mr. McFarland as soon as possible. As noted below, Mr. McFarland is one of many who need representation, and the Center presently has recruitment commitments in other cases. Given the current number of death row inmates without counsel and the posture of those cases relative to Mr. McFarland's, I estimate that it will take at least 120 days from this date to obtain counsel for Mr. McFarland. In the event counsel is recruited sooner, I will immediately notify the Court.

Alternatively, I urge you to withdraw your order seating [sic] the date, appoint and agree to pay counsel to represent Mr. McFarland in a habeas proceeding, and give that counsel 120 days in which to file the Article 11.07 application. Of course, the Center would be available to consult with and assist appointed counsel.

The Center is mindful of the fact that in the past some district attorneys have suggested that our request for time to recruit counsel are unnecessary and made merely as a delaying tactic. This is simply not true. To the contrary, representation of death row inmates in habeas proceedings is in crisis because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row inmates needing post-conviction representation is substantially increasing each year; and (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these

cases is decreasing. This crises [sic] in capital representation was the subject of a recent study commissioned by the Texas Bar Association:

We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty.

[T]he results of our study disclose that the situation in Texas can only be described as desperate. The volume of cases is overwhelming. Presently no funds are allocated for payment of counsel or litigation expenses at the state habeas level. Recruiting efforts for volunteer attorneys coordinated by the State Bar of Texas and the Texas Resource Center have been substantial, but the number of available attorneys and firms remains limited. In the long run, the problem in Texas cannot and will not be solved by a voluntary program. Many lawyers are reluctant to take cases which invariably require an enormous personal sacrifice without compensation. Other lawyers refuse to take additional cases after having experienced a whole range of problems with their most recent case or cases. Moreover, most lawyers are reluctant to participate because of the substantial complexity of the law. Finally, the large number of cases with approaching dates of execution makes the problem most acute at this time.

A Study of Representation of Capital Cases in Texas, by the Spangenberg Group, at i-ii (emphasis added).

Presently, there are approximately *seventy* unrepresented inmates on Texas' death row who are in the post-

conviction stage, and the numbers are increasing at a record pace. The convictions and sentences of thirteen of those unrepresented inmates were affirmed by the Court of Criminal Appeals before Mr. McFarland's. When Mr. McFarland's execution date was scheduled, the Center was already facing executions scheduled for six other unrepresented inmates.

The existence of an imminent execution date makes it virtually impossible to recruit an attorney. Few attorneys will consider taking a case without an assurance that they can become familiar with the case and provide adequate representation before being faced with an execution date. For this reason, in lieu of setting an execution date, the Center has been urging courts to enter scheduling orders specifying the recruiting deadline and providing a later deadline for the filing of an application. In most cases in which this has happened, the Center has met the recruitment deadline and the recruited attorney has met the filing deadline. The Center has not previously requested a scheduling order in Mr. McFarland's case because we were not notified of the sentencing hearing and only learned of the September 23rd execution date in a letter from Mr. McFarland after the court's order was entered.

I apologize to the Court for not providing the information in this letter immediately upon learning of the September 23 execution. Our delay in contacting the court was caused by the fact that the attorneys who handle recruitment and the problems of unrepresented death row inmates were dealing with numerous crises during the first three weeks in September, including the scheduled executions for several other unrepresented inmates.

Again, I urge you to withdraw your order setting Mr. McFarland's September 23rd execution date and enter a scheduling order that allows 120 days for the recruitment of an attorney and an additional 120 days within which to file a state habeas application. This Court clearly has the power to do so under Art. 5, § 8 of the Texas Constitution. The previously stated position of the Tarrant County district attorney's office that the court can't withdraw an execution date in the absence of the filing of a state habeas petition is clearly in error. It ignores this Court's inherent jurisdiction over its own orders and conflicts with the practices of trial courts all over this state.

I or another attorney with our office will be happy to discuss our efforts to recruit [sic] an attorney for Mr. McFarland with you and the district attorney either in person or by telephone. Also, I would appreciate your notifying me of the setting of Mr. McFarland's motion for hearing.

Sincerely,

/s/ Eden Harrington
Executive Director

cc: District Attorney,
Tarrant County
William Zapalac,
Assistant Attorney General

Texas Resource Center

October 16, 1993

Hon. Don Leonard
District Judge
Criminal District Court No. 3
Justice Center
401 Belknap St.
Fort Worth, Texas 77701

Re: *Ex Parte Frank Basil McFarland*

Dear Judge Leonard:

As you know, Mr. McFarland's execution was previously scheduled to occur on September 23, 1993. On September 20, 1993, Mr. McFarland filed a *pro se* motion informing the court of his desire to pursue relief in an Article 11.07 proceeding and his need for counsel and asking the court to withdraw or modify the order scheduling the execution so that the Texas Resource Center could recruit counsel. By letter dated September 19, 1993, Eden Harrington informed you that the Texas Resource Center had agreed to recruit habeas counsel for Mr. McFarland and urged you to grant Mr. Farland's motion. Ms. Harrington explained in her letter that an imminent execution date makes it virtually impossible for us to recruit *pro bono* counsel unless there is an assurance that the court will give recruited counsel sufficient time to review the record, investigate potential claims and prepare a proper habeas application. Additionally, Ms. Harrington explained that because of the large number of inmates needing state habeas counsel, the Center urges the Court to grant 120 days to recruit counsel and an

additional 120 days for recruited counsel to prepare and file an 11.07 application.

On September 20, 1993, in your absence, Judge Drago modified Mr. McFarland's execution date to October 27, 1993 in order to permit you to consider and rule on the Center's request and Mr. McFarland's motion. As the new executive director of the Resource Center, I am writing to you to reaffirm our willingness to recruit counsel for Mr. McFarland and to explain our need for additional time.

At this time despite our best efforts, we have been unable to secure counsel for Mr. McFarland. This lack of success is not surprising. Ms. Harrington explained the recruiting difficulties caused by imminent execution dates in detail in page three of her letter to you. Simply put, no competent lawyer will take on a highly complex case *pro bono*, where literally, life is at stake, without adequate time to prepare it. Her letter also accurately described the enormous gap between demand for volunteer counsel at the state habeas level and the supply of lawyers willing to undertake these cases *pro bono*. There is no realistic prospect of success of recruiting counsel for Mr. McFarland so long as he continually faces an execution date less than a month away and there are no assurances that recruited counsel will be given sufficient time to prepare a proper habeas petition.

However, given enough time, there is good reason to believe that we will be able to recruit counsel for Mr. McFarland. In the brief time since his date was modified, the Center has successfully recruited state habeas counsel for an inmate where the district attorney's office had

agreed to work out a filing schedule with recruited counsel and federal habeas counsel in a case where the federal court had granted sufficient time for recruited/appointed counsel to file a federal habeas petition.

Understandably, Judge Drago was unwilling to do more than modify Mr. McFarland's date to allow you the opportunity to fully consider this situation and decide on an appropriate course of action. I hope that you will seriously consider entering a scheduling order granting the Center 120 days to recruit counsel for Mr. McFarland and allowing recruited counsel 120 days to review the record, investigate the case, and file the state habeas application.

It is important to note that as the number of unrepresented inmates continues to grow, it is becoming increasingly to find volunteer counsel to represent capital defendants in state habeas proceedings. More frequently, lawyers are willing to take these cases only if they can be appointed and paid. For this reason we are able recruit attorneys for federal court more quickly and more easily than we can for state court. If we were assured that the Court would exercise is [sic] discretionary power to appoint and pay counsel at a reasonable hourly rate, the difficulties recruiting counsel would be substantially reduced. In either event, new counsel will need approximately 120 days in which to prepare and file the state habeas petition to ensure that all available claims are properly raised.

We again urge you to consider and grant Mr. McFarland's *pro se* motion and enter an order that ensures him the assistance of counsel and one meaningful opportunity

to challenge his conviction and sentence in state habeas proceedings. We do this not as his counsel, but to bring the issue before the Court for your consideration in a reasonable way. A proposed order is enclosed for your consideration.

The Center will continue to assist the Court with this process. I or another attorney with our office will be happy to discuss our efforts to recruit an attorney for Mr. McFarland with you and a representative of the district attorney either in person or by telephone. Also, I would appreciate your notifying me of the setting of any motions regarding Mr. McFarland's execution date. Thank you.

Sincerely,

/s/ Mandy Welch
Executive Director

cc: District Attorney,
Tarrant County
Peggy Griffey
Assistant Attorney General

Court of Criminal Appeals

State of Texas
Box 12308
Capitol Station
Austin 78711
October 22, 1993

RE: Writ No. 25,518-01

Frank Basil McFarland

Dear Judge Leonard:

Enclosed herein is an order entered by this Court regarding the above-referenced applicant.

If you should have any questions concerning this matter, please do not hesitate to contact me.

Sincerely [sic],

/s/ John G. Jasuta
John G. Jasuta
Chief Staff Attorney

JGJ/bh

cc: Dist Attorney Tarrant County
401 West Belknap
Fort Worth, TX 76196

Mandy Welch
Texas Resource Center
3223 Smith Street
Suite 215
Houston, TX 77006

S. O. Woods
Records & Classifications
P.O. Box 99
Huntsville, TX 77340

Frank Basil McFarland
TDC #963
Ellis I Unit
Huntsville, TX 77343

EX PARTE FRANK BASIL
McFARLAND

WRIT NO. 25,518-01

Motion for Stay
of Execution
from TARRANT County

ORDER

This is a Motion to Stay Execution Date seeking a postponement of the scheduled execution date to allow Applicant to seek volunteer *pro bono* counsel to assist in the filing of an application for habeas corpus relief. This Court affirmed Applicant's capital murder conviction and resulting sentence of death on direct appeal. *McFarland v. State*, 845 S.W.2d 824 (Tex.Cr.App. 1992). The trial court has scheduled Applicant's execution to be carried out on or before sunrise on October 27, 1993.

Applicant has filed a motion to stay the execution to permit the recruitment of counsel for the purposes of researching and filing an application for a writ of habeas corpus. Upon due consideration, Applicant's motion is in all respects denied.

**IT IS SO ORDERED THIS THE 22ND DAY OF
OCTOBER, 1993.**

PER CURIAM

EN BANC

DO NOT PUBLISH

Clinton, Baird and Maloney, JJ., would grant the stay.
Miller, J., not participating

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

FRANK BASIL MCFARLAND

Petitioner,

vs.

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division

Respondent.

§
§
§
§
§
§
§
§
§
§
§

HABEAS
CORPUS

No. Illegible

PETITIONER'S PRO SE MOTION FOR STAY OF EXECUTION AND REQUEST FOR APPOINTMENT OF COUNSEL

Petitioner Frank McFarland, who is unrepresented, hereby seeks a stay of execution and appointment of counsel to assist him in post-conviction proceedings under 28 U.S.C. Sec. 2254. In support of this motion, Mr. McFarland states the following:

1. I am scheduled to be executed October 27, 1993 and do not have a lawyer to represent me. I have asked for a stay of execution and for a lawyer in the state courts, and they have refused. I was convicted and sentenced to death in the Criminal District court Number Three of Tarrant County, Texas on November 15, 1989. I was represented on appeal to the Texas Court of Criminal appeals by Jack V. Strickland, who withdrew after that court affirmed my conviction and sentence. I was represented in the United States Supreme Court by Isaiah S.

Gant, who represented me solely for purposes of drafting and filing my petition for writ of certiorari. I have not had a lawyer since Mr. Gant withdrew, nor have I had access to the assistance of counsel.

2. The trial court scheduled my execution without informing the Texas Resource Center, an organization that regularly recruits lawyers for people on death row in state and federal habeas corpus proceedings. I have asked the Resource Center to find a lawyer to represent me in state habeas corpus proceedings and before this Court in proceedings pursuant to 28 U.S.C. §2254. The Center has told me that it cannot represent me directly because of the large number of cases for which it is now directly responsible, but that it will work to recruit a lawyer for me. The Center has assisted me in preparing this motion and is giving the Court additional information concerning its situation by a letter attached to this motion as Exhibit A.

3. I wish to challenge my conviction and sentence under 28 U.S.C. Sec. 2254. I have never had a federal habeas petition filed on my behalf, and, as I mentioned, have never had the assistance of counsel in post-conviction proceedings. Under these circumstances, I am entitled to the assistance of counsel under 21 U.S.C. § 848(q)(4)(B) and under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *Murray v. Giaratano*, 492 U.S. 1 (1989) (Kennedy, J., concurring).

4. I also believe I am entitled to a stay of execution. Any attorney this Court appointed must be given the opportunity to review my case, conduct the necessary

investigation, and file the appropriate pleadings. Since counsel cannot perform these tasks in the days remaining before my scheduled execution, unless this Court grants a stay of execution, the right to counsel will become meaningless. In addition, even apart from my right to counsel, this Court is required under 28 U.S.C. Sec. 2254 to conduct a meaningful review of my conviction and sentence, a review that cannot take place before my scheduled execution. I am entitled to a stay for that reason as well. Finally, this Court has jurisdiction to stay my execution under *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991).

5. For all those reasons, I respectfully request that this Court:

- a. stay my scheduled execution;
- b. appoint qualified counsel to represent me in post-conviction proceedings;
- c. allow newly appointed counsel a reasonable period, but not less than 120 days, in which to familiarize himself with my case and prepare the necessary pleadings, including a first petition for writ of habeas corpus.

Respectfully submitted,

/s/ Frank B. McFarland
 Frank Basil McFarland
 Proceeding *pro se*
 Ellis I Unit
 T.D.C.J. I.D. #963
 Huntsville, TX 77343
 (409) 295-5756

AFFIDAVIT OF VERIFICATION

STATE OF TEXAS)
) SS
 COUNTY OF WALKER)

Under the pains and penalties of perjury, I sear that I have read and assisted in the preparation of the foregoing *PRO SE* MOTION FOR STAY OF EXECUTION AND REQUEST FOR APPOINTMENT OF COUNSEL. I am familiar with its contents, and to the best of my knowledge and belief the matters set forth therein are true and correct.

/s/ Frank B. McFarland
 Frank Basil McFarland

Subscribed and sworn to before me this 19th day of October, 1993.

/s/ Casandra Valmond
 [SEAL]

My Commission Expires:

10/29/94

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of this MOTION FOR APPOINTMENT OF COUNSEL AND FOR STAY OF EXECUTION on all parties herein by facsimile transmission on October 22, 1993 to:

Andrea March
 Enforcement Division
 Office of the Attorney General
 209 West 14th Street
 Price Daniel, Sr. Building
 8th Floor
 Austin, TX 78701

/s/ Lynn B. Illegible

Texas Resource Center

October 22, 1993

United States District Court
Northern District of Texas, Fort Worth Division
202 U.S. Courthouse
501 W. 10th Street
Fort Worth, Texas 76102

Re: Frank Basil McFarland v. Collins

On October 27, 1993, Mr. Frank Basil McFarland, an unrepresented Texas death row inmate, is scheduled to be executed by the State of Texas. Mr. McFarland has filed a *pro se* motion with this Court seeking a stay of execution and appointment of counsel. Mr. McFarland's motion sets out the essential facts of his previous representation and current lack of the same.

As you may know, the Texas Resource Center has been designated by the Northern District of Texas as a federal community defender organization charged with the responsibility for recruiting counsel for unrepresented, death-sentenced inmates in federal habeas corpus proceedings and consulting with, training, and assisting recruited counsel. Although the Center provides direct representation for a limited number of inmates, it not sufficiently staffed to undertake representation of the large number of unrepresented Texas death row inmates whose cases are entering the collateral review stage.¹

¹ The Center is presently involved in some respect in 207 capital cases in Texas. The Center recently agreed to represent three inmates whose state habeas petitions are due, under

Mr. McFarland has informed the Texas Resource Center that he wishes to pursue collateral attacks on his conviction and sentence, and that he needs an attorney to represent him. Because of its current obligations in other cases and the time and resources required to recruit counsel for the growing number of unrepresented death row inmates, the Center is unable to represent Mr. McFarland. The Center has agreed to recruit an attorney for Mr. McFarland, but has not been able to do so.

At present, the Center is facing the greatest crisis of unrepresented death row inmates since its inception. This crisis has come about because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row inmates needing post-conviction representation is substantially increasing each year; (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these cases is decreasing; and (4) the presence of an imminent execution date which makes it virtually impossible to recruit counsel.²

negotiated filing schedules, before the end of the year. One of those inmates, Richard Jones, has an execution date of November 2, 1993. Additionally, the Center is attempting to recruit counsel for more than 70 unrepresented inmates whose direct appeals have been affirmed.

² Few attorneys will consider taking a capital case without an assurance that they will have time to become familiar with it and provide adequate representation before their client is executed. However, in most cases in which the state courts have agreed to enter scheduling orders in lieu of setting execution dates, the Center has met the recruitment deadline and the recruited attorney has met the filing deadline.

Mr. McFarland's case is emblematic of the cases of many other unrepresented inmates on death row in Texas. At present, seven inmates who have not yet pursued habeas corpus relief in any court and are unrepresented have execution dates before the end of the year. They are:

October 27	Frank McFarland (Tarrant County)
November 2	Kevin Zimmerman (Jefferson County)
November 3	Aaron Fuller (Dawson County)
November 10	Anthony Cook (Milam County)
November 18	Martin Vega (Caldwell County)
November 23	Michael Lockhart (Bexar County)
December 3	Orien Joiner (Lubbock County)

These men are among the approximately seventy unrepresented inmates on Texas, death row who are in the post-conviction stage, and the numbers are increasing at a record pace. The convictions and sentences of thirteen of those unrepresented inmates were affirmed by this Court before Mr. McFarland's. Mr. McFarland's execution date was initially scheduled for September 23, 1993, without notice to the Center. At the time, six other unrepresented inmates were also facing imminent execution dates.

To assure that Mr. McFarland would have a meaningful review of the legality of his detention, the Resource Center provided him with a *pro se* request for a stay of execution and appointment of counsel which was filed in the state courts. The Center, through letters to the state district court, Hon. Judge Don Leonard presiding, encouraged that court to enter a scheduling order rather than use an execution date to govern the progress of Mr.

McFarland's case. Copies of those letters are enclosed. On September 20, a visiting judge in the state trial court modified Mr. McFarland's then-existing date by somewhat more than thirty days to the present date to enable Judge Leonard, who was out-of-town, to consider and rule on Mr. McFarland's motion. This week, Judge Leonard denied Mr. McFarland's request that his date be withdrawn or modified to enable him to obtain an attorney. Mr. McFarland filed a motion with the Texas Court of Criminal Appeals yesterday, October 21, 1993, setting forth his situation and asking the Court for a stay until he can obtain counsel. However, experience suggests that court will likewise refuse to grant a stay.

Mr. McFarland is thus compelled to come to this Court for a stay and appointment of counsel to protect his right to federal habeas review of the constitutionality of his conviction and death sentence. An indigent state prisoner seeking to vacate a death sentence in "any post conviction proceeding under section 2254 . . . of Title 28" is entitled to the appointment of one or more attorneys to represent him. 21 U.S.C. § 848(q)(4)(B). *See also Murray v. Giarratano*, 492 U.S. 1 (1989) (Kennedy, J., concurring).³

³ In *Giarratano*, a plurality of the Court held that a habeas petitioner under sentence of death has no constitutional right to counsel in post-conviction proceedings. The holding of the Court, however, is far more limited. In concurrence, Justice Kennedy stated that because *Giarratano* had received limited assistance of counsel, no error appeared in that case. Justice Kennedy was not willing to hold that a state could deny a death sentenced inmate access to *any* assistance of counsel in post-conviction proceedings – the issue presented in Mr. McFarland's case. Based on the dissenting and concurring views in *Giarratano*, therefore, the Resource Center believes Mr. McFarland is

Mr. McFarland is indigent and this court has jurisdiction to stay his execution "in order to appoint counsel to assist [him] in preparing and filing a petition for federal habeas corpus relief." *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991). Under 28 U.S.C. § 2251, United States district judges "before whom a habeas corpus proceeding is pending" clearly have authority to stay state court proceedings. Under 18 U.S.C. § 30006A, The Criminal Justice Act of 1964, and 21 U.S.C. § 848(q)(4)(B), the court not only has the authority to appoint counsel for a habeas corpus petitioner seeking relief from a death sentence, but has a statutory obligation to do so.

When confronted with a case in an almost identical procedural posture recently, Hon. Robert M. Parker, Chief Judge for the United States District Court for the Eastern District of Texas, ruled that a federal district court "has jurisdiction to stay his [petitioner's] execution 'in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief,'" *Mooney v. Collins*, No. 6:92cv254, slip op. at 2 (E.D. Tex. April 30, 1992) (quoting *Brown v. Vasquez*, 952 F.2d 1164, 1165 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 1992 WL 51827 (U.S.), 60 U.S.L.W. 3655 (U.S., Apr. 27, 1992) (No. 91-1425)).⁴ Judge Parker found that the circumstances there, which so closely parallel this case, satisfied the standard for a stay of execution set out in *Barefoot v. Estelle*, 463 U.S. 880 (1982). Judge Parker gave the Resource Center one hundred twenty days to recruit counsel for Mr. Mooney, and

entitled to counsel under the Sixth, Eighth, and Fourteenth Amendments.

⁴ A copy of Judge Parker's orders in *Mooney* are enclosed.

the Center notified the court within ninety days that counsel had been located. Judge Parker appointed the attorney located by the Resource Center to represent Mr. Mooney, and entered a scheduling order.

In a similar case, the Hon. Jorge A. Solis, United States District Judge for the Northern District of Texas, granted a stay of execution and ordered that legal counsel located by the Resource Center be appointed and given one hundred twenty days in which to prepare and file an amended petition for writ of habeas corpus. *Caldwell v. Collins*, No. 3:92CV1316-P (N.D. Tex. June 30, 1992). (Order enclosed). The Resource Center had located counsel for Mr. Caldwell shortly before his execution, but the state courts refused to stay or modify the execution date in order for his attorneys to prepare and file a habeas petition on his behalf.

In yet another case, the Hon. George P. Kazen, United States District Judge for the Southern District of Texas, granted a stay of execution and ordered that the Resource Center be given one hundred days from receipt of his order to recruit counsel to file an amended petition for writ of habeas corpus. *Hernandez v. Collins*, No. L-92-111 (S.D. Tex. August 21, 1992) (Memorandum Opinion and Order enclosed). The Resource Center located counsel for Mr. Hernandez within the allowed time. The state courts had refused to stay or modify the execution date to allow the Resource Center to recruit counsel. In his Memorandum Opinion, Judge Kazen noted, "The case reflects the ever-growing crisis concerning the obtaining of quality legal representation for indigent defendants sentenced to

death. As indicated in the filings, the number of scheduled executions is rising while the willingness of attorneys to represent such defendants is declining." *Id.* at 1.

Honorable Robert B. Maloney, United States District Judge for the Northern District of Texas, granted a stay of execution and ordered an amended federal habeas petition filed in 100 days in *Long v. Collins*, No. 3-92CV1889-T (N.D. Tex. September 15, 1992) (Order enclosed). Mr. Long had been scheduled to be executed on September 17, 1992. Shortly before the scheduled execution, counsel recruited just days earlier by the Resource Center filed a Motion for Appointment of Counsel and for Stay of Execution with the Court. Counsel noted the impossibility of completing more than a cursory review of parts of the record and pointed out issues that would eventually merit careful federal habeas review. Counsel's motion for a stay or modification of the execution date filed with the state trial court and Texas Court of Criminal Appeals, based upon lack of time to prepare a state habeas petition, was denied by both courts.

On January 22, 1993, the Honorable A. Joe Fish, United States District Judge for the Northern District of Texas, granted a stay of execution in *Sterling v. Collins*, No. 3-93CV0147-G (N.D. Tex. Jan. 22, 1993) (Order enclosed). Judge Fish took this action after a motion for stay or modification of the execution date filed by the Texas Resource Center with the state trial court and the Texas Court of Criminal Appeals, based on Mr. Sterling's lack of representation, was denied by both courts. Judge Fish gave the Resource Center 120 days to recruit counsel who could then prepare and file a proper amended habeas corpus petition.

These judges are not the only jurists who have found the reasoning of *Brown* persuasive regarding the granting of a stay. In *Steffen v. Tate*, No. C-1-92-495 (S.D. Ohio June 18, 1992), the court granted a stay to preserve its jurisdiction to hear an unexhausted ineffective assistance of counsel claim. (Order enclosed). In doing so, the Court said:

The Court is faced with the imminent prospect that unless it acts promptly to grant petitioner's request, [for a stay] petitioner will be executed without ever obtaining federal review of his constitutional claims. The Court strongly believes that petitioner is entitled to such review, and nothing in *McClesky* or any other decisions of the United States Supreme Court is to the contrary.

Id., slip op., 3-4.

As the director of the Resource Center, I urge this Court to take similar action in Mr. McFarland's case. If this Court stays Mr. McFarland's execution, I am confident we can recruit qualified counsel to accept an appointment so long as we can provide assurances that appointed counsel will have a least 120 days to prepare and file a federal habeas petition on Mr. McFarland's behalf. I will be happy to discuss our efforts to recruit an attorney for Mr. McFarland with the court, and the Attorney General's office at any time. I hope that we can work together to solve this representation problem and

promote the orderly and careful review of Mr. McFarland's case.

Sincerely,

/s/ Mandy Welch
Mandy Welch
Executive Director

Enclosures

cc: Andrea March
Assistant Attorney General

ENCLOSURE

EOD 5-1-92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

NELSON WAYNE MOONEY,

Petitioner,

vs.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

*
*
*
* HABEAS
* CORPUS
* No. 6:92cv254
*
*
*
*

ORDER APPOINTING COUNSEL
AND STAYING EXECUTION

Before the Court as of 7:30 p.m. were: Petitioner's Motion for Appointment of Counsel and for Stay of Execution; Petitioner's Motion to Proceed *in Forma Pauperis*, with supporting affidavit. At approximately 7:30 p.m., the Court received Petitioner's Petition for Writ of Habeas Corpus, and thus it too is now before the Court.

Petitioner Mooney has no attorney to help him file his initial application for Writ of Habeas Corpus,¹ and yet he is scheduled to be executed by lethal injection shortly after midnight the morning of May 1, 1992.

¹ The federal habeas corpus statutes are codified at 28 U.S.C. §§ 2241-2255.

An indigent state prisoner seeking to vacate a death sentence in any post conviction proceeding under 28 U.S.C. § 2254 is entitled to the appointment of one or more attorneys to represent her. 21 U.S.C. § 848(q)(4)(B). Petitioner Mooney is indigent. See Petitioner's Motion to Proceed *in Forma Pauperis* (with supporting affidavit). And this Court has jurisdiction to stay his execution "in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief." *Brown v. Vasquez*, 952 F.2d 1164, 1165 (9th Cir. 1991), cert. denied, ___ U.S. ___, 1992 WL 51827 (U.S.), 60 U.S.L.W. 3655 (U.S., Apr. 27, 1992) (No. 91-1425).

Under 28 U.S.C. § 2251, United States District Court judges "before whom a habeas corpus proceeding is pending" have authority to stay state court proceedings. What Petitioner has filed with this Court – Motion for Appointment of Counsel and for Stay of Execution – can be interpreted as the functional equivalent of a petition for a Writ of Habeas Corpus, albeit with prayers for leave to amend so as to "assert all possible violations of his constitutional rights in his initial application." *Brown*, 952 F.2d at 1167 (citing *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1467 (1991)).² And based on the crisis filing of

² In *McCleskey*, the Supreme Court held that the doctrine of abuse of the writ barred a prisoner from asserting a constitutional claim in a subsequent federal habeas corpus proceeding when he had not raised the claim in his initial federal application and could not show either good cause for failure initially to raise the claim and prejudice resulting from such failure, or that a fundamental miscarriage of justice would result if the claim were not entertained. ___ U.S. ___, at ___, 111 S.Ct. 1454, at 1467. And in *Antone v. Dugger*, 465 U.S. 200, 205-206 & n.4 (1984) (per

Attorney Mandy Welch, on Petitioner Mooney's behalf, the Court is persuaded that Petitioner has satisfied the pertinent stay of execution factors.

The standard for issuing a stay of execution has been set out by the United States Court of Appeals for the Fifth Circuit many times:

In deciding whether to issue a stay of execution, [the court is] required to consider four factors: (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

Buxton v. Collins, 925 F.2d 816, 819 (5th Cir. 1991); *Byrne v. Roemer*, 847 F.2d 1130, 1133 (5th Cir. 1988). Although in a capital case, "the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities (i.e. the other three factors) weighs heavily in the favor of granting the stay." *Byrne*, 847 F.2d at 1133; *Brogdon v. Butler*, 824 F.2d 338, 340 (5th Cir. 1987); *O'Bryan v. McCaskle*, 729 F.2d 991, 993 (5th Cir. 1984). As the United States Supreme Court has observed, "a death sentence cannot . . . be carried out by the State while substantial

curiam), the Court held that a habeas petitioner would not be excused from failing to file all claims because his counsel had to prepare the first petition in haste and did not have time to familiarize herself with the petitioner's case. See *McCleskey*, ___ U.S. ___, at ___, 111 S.Ct. 1454, at 1467.

legal issues remain outstanding" and the courts should not "fail to give non-frivolous claims of constitutional error the attention they deserve." *Barefoot v. Estelle*, 463 U.S. 880, 888 (1982). Based on the points raised by Attorney Welch on behalf of Petitioner Mooney at pages 8 – 11 of Petitioner's Motion for Appointment of Counsel and for Stay of Execution, the Court finds all four *Buxton* factors satisfied – in light of the fact that the Court finds that the balance of the equities (*i.e.* the last three factors) weighs heavily in the favor of granting the stay.³

Moreover, this Court finds Petitioner is entitled to a stay of execution for the same reasons the Ninth Circuit in *Brown v. Vasquez*, 952 F.2d 1164, 1169 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 1992 WL 51827 (U.S.), 60 U.S.L.W. 3655 (U.S., Apr. 27, 1992) (No. 91-1425), found California State Prisoner John G. Brown deserved a stay: the application for the appointment of counsel to assist a death penalty prisoner in preparing a petition for federal habeas corpus relief, and for stay of execution, constitutes part of a "habeas corpus proceeding." In short,

[g]iven the fundamental importance of the writ, it is essential that it be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." [] The [Supreme] Court has "consistently rejected interpretations of the habeas corpus statute that would suffocate the

³ At approximately 7:30 p.m., the Court received Petitioner's Petition for Writ of Habeas Corpus. The Court finds the claims raised in this document likewise compel the conclusion that a stay of execution is in order in this case, under *Buxton*.

writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements."

Brown, 952 F.2d at 1166 (quoting: *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973); and accentuating that the *Harris* admonition to interpret the federal habeas corpus statute with "initiative and flexibility" is especially important in cases like *Brown* – *i.e.*, those in which a death penalty prisoner facing execution has no counsel – in light of the Supreme Court's *McCleskey* decision) (citation omitted).

CONCLUSION

For the foregoing reasons, it is hereby ORDERED, ADJUDGED and DECREED that Petitioner's Motion is GRANTED, pending his habeas corpus proceeding. The Texas Resource Center is appointed as counsel on this habeas corpus matter.⁴

SO ORDERED.

SIGNED THIS THE 30TH DAY OF APRIL, 1992.

/s/ Robert M. Parker
HONORABLE ROBERT M. PARKER,
CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

⁴ The Texas Resource Center is a private, non-profit corporation designated by this Court as a Federal Community Defender Organization to recruit and designate private attorneys for appointment in federal habeas corpus proceedings. See *Addendum to Criminal Justice Act Plan* for the United States District Court for the Eastern District of Texas.

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

JEFFERY CALDWELL,

Petitioner,

vs.

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent

)
)
)
) CIVIL ACTION
) NO. 3:92CV1316-P
)
)
)
)
)
)

ORDER

Before the Court are petitioner Jeffery Caldwell's Motion for Appointment of Counsel and for Stay of Execution; petitioner's Motion to Proceed *in Forma Pauperis*, with supporting affidavit; and petitioner's Petition for Writ of Habeas Corpus and Motion for Stay of Execution.

Petitioner has not had legal counsel to help him prepare and file an adequate initial Petition for Writ of Habeas Corpus, and he is scheduled to be executed by lethal injection shortly after midnight the morning of July 2, 1992.

Petitioner's motion for appointment of counsel is granted. The following attorneys are appointed to represent petitioner in this habeas corpus proceeding:

Nancy R. Vanderheider
Peter MacMillan

Mark Schneider
Rosenthal, Rondoni & MacMillan, Ltd.
7600 Bass Lake Road, Ste. 120
Minneapolis, Minnesota 55428
(612) 533-4938

They are granted 120 days within which to prepare and file an amended petition for writ of habeas corpus.

Petitioner's motion for stay of execution is also granted, and petitioner's execution, currently scheduled for July 2, 1992, is hereby stayed.

Petitioner is allowed to proceed without prepayment of costs and fees because he is indigent.

Dated this 30th day of June, 1992.

/s/ Jorge A. Solis
United States District Judge

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

ROGELIO RANGEL HERNANDEZ,)
Petitioner,)

vs.)

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division)

Respondent.)

) HABEAS
) CORPUS
) No. CA-L-92-111

ORDER

Before the Court are petitioner Rogelio Hernandez' Motion for Appointment of Counsel and for Stay of Execution; petitioner's Motion to Proceed *In Forma Pauperis*, with supporting affidavit; petitioner's petition for Writ of Habeas Corpus and Motion for Stay of Execution.

Petitioner does not have legal counsel to help him prepare and file an adequate initial petition for writ of habeas corpus, and he is scheduled to be executed by lethal injection shortly after midnight the morning of August 21, 1992. Accordingly,

- 1) Petitioner's motion for stay of execution is granted, and petitioner's execution, currently scheduled for August 21, 1992, is hereby stayed;
- 2) The Texas Resource Center is given 100 days from receipt of this Order to recruit counsel for Mr. Hernandez who can prepare and file a proper amended habeas corpus petition;
- 3) Petitioner is allowed to proceed without payment of costs and fees because he is indigent.

Dated this 20th day of August, 1992.

/s/ George P. Kazen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

ROGELIO RANGEL HERNANDEZ,	*	
	*	
Petitioner,	*	
vs.	*	CIVIL ACTION
	*	NO. L-92-111
JAMES A. COLLINS, DIRECTOR,	*	
TEXAS DEPARTMENT OF	*	
CRIMINAL JUSTICE,	*	
INSTITUTIONAL DIVISION,	*	
	*	
Respondent.	*	

MEMORANDUM OPINION

Pending is Petitioner's motion for appointment of counsel and for stay of execution, followed by a petition for writ of habeas corpus attacking Petitioner's state court conviction in 1989. The original motion for stay was filed shortly before 11:00 a.m. today by fax transmission. The petition for writ of habeas corpus was filed at approximately 2:00 p.m. today, also by fax. Petitioner is scheduled to die by lethal injection some time after midnight. The stay is unopposed by the State of Texas.

The case reflects the ever-growing crisis concerning the obtaining of quality legal representation for indigent defendants sentenced to death. As indicated in the filings, the number of scheduled executions is rising while the willingness of attorneys to represent such defendants is declining. In addition to all other obstacles, the motion asserts that Hernandez cannot secure representation because of "the location of the county of his conviction."

Deciding whether to issue a stay of execution in the Fifth Circuit requires a consideration of four factors: 1) whether the movant has shown likelihood of success on the merits; 2) whether the movant has made a showing of irreparable injury if the stay is not granted; 3) whether the granting of the stay would substantially harm the other parties; and 4) whether the granting of the stay would serve the public interest. *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991). In a capital case, however, the movant need not always show a probability of success on the merits but must present a substantial showing that a serious legal question is involved and that the other three factors weigh heavily in favor of the stay. *Byrne v. Romer*, 847 F.2d 1130, 1133 (5th Cir. 1988).

The Court has examined the two grounds for relief, with corresponding subparts, in the petition for writ of habeas corpus. Hernandez has presented a substantial showing that serious legal questions are involved. At the same time, the other three *Buxton* factors weigh heavily in favor of granting the stay. If the stay is denied, the injury to Hernandez will be irreparable in the extreme – he will die. Granting the writ would not substantially harm the state, which has expressly indicated no objection to it. The public interest would be served by giving Hernandez a fair chance to be heard in federal court. As the United States Supreme Court has stated, “a death sentence cannot . . . be carried out by the State while substantial legal issues remain outstanding” and the courts should not “fail to give no frivolous claims of constitutional error the attention they deserve.” *Barefoot v. Estelle*, 463 U.S. 880, 888 (1982). Further, as indicated in the State’s response, this Court will eventually be required to expressly rule on

each issue raised in the petition, reviewing them in light of the appropriate state court records. It would be physically impossible to accomplish that task in the few hours remaining before the scheduled execution.

For the foregoing reasons, the motion for stay of execution will be GRANTED.

DONE at Laredo, Texas, this 20th day of August,
1992.

/s/ George P. Kazen
United States District Judge

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

DAVID MARTIN LONG,

Petitioner,

vs.

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division

Respondent.

CIVIL ACTION
No. 3-92CV1889-T

ORDER

Before the Court are Petitioner David Long's Motion for Appointment of Counsel and for Stay of Execution, and Petitioner's Motion for Leave to Proceed *in Forma Pauperis*, with supporting affidavit. On due consideration, Petitioner's Motion for Appointment of Counsel is GRANTED, and the following attorneys are appointed to represent Mr. Long in this matter:

Mr. Danny Burns
115 N. Henderson St.
Ft. Worth, Texas 76102-1940
(817) 870-1544

John H. Blume
1247 Sumter Street
Suite 303
Columbia, S.C. 29201
(803) 765-0650

Counsel are granted 100 days within which to prepare and file an amended petition for writ of habeas corpus.

This Court also finds on due consideration that Petitioner has satisfied the standards for a stay of execution as set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1982) and *Burton v. Collins*, 925 F.2d 816 (5th Cir. 1991). His Motion for Stay of Execution is accordingly GRANTED. Petitioner's execution, currently scheduled for September 17, 1992, is hereby stayed pending further order of this Court.

Petitioner's Motion for Leave to Proceed *In Forma Pauperis* is GRANTED.

Dated this 15th day of September, 1992.

/s/ Illegible
United States District Judge

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GARY STERLING,)	HABEAS
Petitioner,)	CORPUS
vs.)	No. 3-93CV0147-G
JAMES A. COLLINS,)	(Filed Jan 22 1993)
Director, Texas Department)	
of Criminal Justice,)	
Institutional Division)	
Respondent.)	
_____)	

ORDER

Before the Court are petitioner Gary Sterling's Motion for Appointment of Counsel and for Stay of Execution; Motion to Proceed *In Forma Pauperis*, with supporting affidavit; and Petition for Writ of Habeas Corpus.

Petitioner does not have legal counsel to help him prepare and file an adequate initial petition for writ of habeas corpus, and he is scheduled to be executed by lethal injection shortly after midnight the morning of January 25, 1993. Accordingly,

- 1) Petitioner's motion for stay of execution is granted, and petitioner's execution, currently scheduled for January 25, 1993, is hereby stayed;
- 2) The Texas Resource Center is given 120 days from receipt of this Order to recruit counsel for Mr. Sterling who can then prepare and file a proper amended habeas corpus petition;

- 3) Petitioner is allowed to proceed without payment of costs and fees because he is indigent.

Dated this 22 day of January, 1993.

/s/ Illegible
United States District Judge

ENCLOSURE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID JOSEPH STEFFEN,	:	Case C-1-92-495
Petitioner,	:	
	:	(Filed 92 JUN 18
vs.	:	PM 3:44)
	:	
ARTHUR TATE, JR., WARDEN,	:	
Respondent.	:	

MEMORANDUM AND ORDER

This matter is before the Court on the application of petitioner David Joseph Steffen for a stay of execution of his death sentence. Petitioner is scheduled to die in the electric chair on Tuesday, June 23, 1992.

On June 10, 1992, the same day the stay application was filed, the Court conducted an informal conference of counsel in chambers. Counsel for petitioner advised the Court that on June 2, 1992, an application for stay had also been filed in the Supreme Court of Ohio. At the time this action was filed, the Supreme Court of Ohio had not

yet acted on the application pending in that court. In deference to the Supreme Court of Ohio, and with the agreement of counsel, this Court withheld its ruling on petitioner's application pending a timely decision by the Supreme Court of Ohio. The Court scheduled an oral hearing for Wednesday, June 17, 1992 at 3:00 p.m., with the anticipation that the Supreme Court of Ohio might announce its decision earlier that day. The Court allowed counsel for the respondent until June 16, 1992 to file a memorandum contra the application for stay.

The oral hearing commenced at 3:00 a.m. on June 17 in the absence of a ruling by the Supreme Court of Ohio. At the close of the hearing, the Court took the matter under advisement.

The Court is now advised that the Supreme Court of Ohio has denied petitioner's application for stay. It has, thus become necessary for this Court to promptly rule on the pending application.

Petitioner filed his application for stay of execution of death sentence pursuant to 28 U.S.C. § 1651, commonly known as the All Writs Act. Petitioner seeks the stay in order to pursue his claim of ineffective assistance of appellate counsel according to the procedure recently set forth by the Ohio Supreme Court in *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992). Petitioner contends that under *McCleskey v. Zant*, 111 S.Ct. 1454 (1991), he will have only one opportunity to pursue habeas corpus relief in federal court. Under the exhaustion doctrine, petitioner must first present all of his constitutional claim to the state court, and a habeas petition which

contains both exhausted and unexhausted claims is subject to dismissal. *Rose v. Lundy*, 455 U.S. 509 (1982). Petitioner thus intends to file his petition for habeas corpus in federal court after his claim of ineffective assistance of appellate counsel claim has been exhausted. Petitioner is invoking the All Writs Act to preserve this Court's jurisdiction until his habeas petition is filed. In addition to the All Writs Act, petitioner relies on 28 U.S.C. § 2251 and S.D. Ohio R. 106(d) in support of this Court's jurisdiction to grant the stay. Prior to a ruling by the Supreme Court of Ohio, respondent challenged the jurisdiction of this Court to grant the stay under any of the bases urged by petitioner.

The Court finds that it has jurisdiction to grant the stay pursuant to 28 U.S.C. § 1651 in order to preserve its potential habeas jurisdiction. *Brown v. Vasquez*, 743 F. Supp. 729 (D.C. Cal. 1990), *aff'd on other grounds*, 952 F.2d 1164 (9th Cir. 1992). Alternatively, this Court asserts jurisdiction pursuant to 28 U.S.C. § 2251 to grant the stay of execution. *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991) [sic], *cert. denied*, 112 S. Ct. 1778 (1992).

The Court is faced with the imminent prospect that unless it acts promptly to grant petitioner's request, petitioner will be executed without ever obtaining federal review of his constitutional claims. The Court strongly believes that petitioner is entitled to such review, and nothing in *McCleskey*, or any other recent decisions of the United States Supreme Court is to the contrary. The Court also feels that, notwithstanding respondent's assertion that the exhaustion rule is not jurisdictional and has exceptions, petitioner should not have to risk what may be his only opportunity of federal review by filing a

petition for habeas corpus under 28 U.S.C. § 2254 prior to exhausting his claim of ineffective assistance of appellate counsel in the Ohio courts.

For the foregoing reasons, the Court shall enter an order staying execution of petitioner's death sentence until further order of the Court.

IT IS SO ORDERED.

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court

RETAIN THIS NUMBER-CUSTOMER
RECEIPT WILL BE MAILED TO YOU.
RB623511394US

Texas Resource Center

October 24, 1993

The Honorable John H. McBryde
Judge of the United States District Court
for the Northern District of Texas
401 U.S. Courthouse
501 West 10th Street
Ft. Worth, Texas 76102

Re: McFarland v. Collins, No. 4:93cv714-A

Dear Judge McBride:

I am writing to inform you of the status of Mr. McFarland's state court proceedings and to suggest a scheduling conference with respect to Mr. McFarland's federal habeas proceeding. Yesterday, the Court of Criminal Appeals denied Mr. McFarland's *pro se* motion for a stay of execution with three judges dissenting. A copy of the order is attached. Also, I have talked with Andrea March, Assistant Attorney General and attorney for Respondent Collins, regarding her position with respect to Mr. McFarland's request for a stay and appointment of counsel before this Court. Ms. March told me that her office will file a response to Mr. McFarland's motion on Monday, but that she was not able to advise me what that response will be.

In previous cases involving unrepresented inmates, the Attorney General's office took the position that a federal court does not have jurisdiction to enter a stay of execution unless a habeas petition is filed, but agreed that it would not oppose a stay so long as a "petition" was filed. In each of those cases, as in Mr. McFarland's case, we had not agreed to represent the inmate, we were not familiar with the trial record, and we were not able to file a properly investigated and researched habeas petition. Nevertheless, to avoid the Attorney General's opposition to a stay, we filed a shell or perfunctory habeas petition on behalf of the inmate with the understanding and expectation that the court would grant a stay, appoint counsel, and give appointed counsel a reasonable time to prepare and file an amended habeas petition. In some cases, recruited counsel was immediately available to accept an appointment. In all but one case, a stay was granted and available counsel was appointed and given time to file an amended petition or the Center was given additional time to recruit counsel. However, in the most recent case, *Gosch v. Collins*, (W.D. Tex.), the federal district court denied a stay the day before the scheduled execution and simultaneously denied a single issue habeas petition on the merits.¹

As I have explained to Ms. March, in light of *Gosch* we do not feel that we can file a perfunctory petition in

¹ The court later granted a stay on a "successor" petition filed about an hour before Mr. Gosch's scheduled execution. However, the restrictions imposed by law on a federal court's consideration of claims raised in a second or successor habeas petition virtually render such proceeding meaningless.

Mr. McFarland's case without an assurance that it will be recognized for what it is and not become Mr. McFarland's only vehicle for federal review of his conviction and death sentence. We do not represent Mr. McFarland, and under the circumstances, I feel very strongly that we should not take any action that makes it appear that he has counsel when in fact he does not. At the same time, we want to cooperate with the Court and the Attorney General to assure that Mr. McFarland has qualified counsel who is given sufficient time and resources to represent him properly. In this regard, I request that the Court schedule a conference that includes a Resource Center attorney and someone from the Attorney General's office to discuss an appropriate resolution of our dilemma.

I can be reached in our Houston office, (713) 522-5917, on Monday and in our Austin office, (512) 320-8300, on Tuesday. Thank you for your consideration.

Sincerely,

/s/ Mandy Welch
MANDY WELCH
Executive Director

Encl.

CC: Pam Murphy, Deputy Clerk

Andrea March, Assistant Attorney General

EX PARTE FRANK BASIL
McFARLAND

WRIT NO. 25,518-01

Motion for Stay of
Execution
from TARRANT County

ORDER

This is a Motion to Stay Execution Date seeking a postponement of the scheduled execution date to allow Applicant to seek volunteer *pro bono* counsel to assist in the filing of an application for habeas corpus relief. This Court affirmed Applicant's capital murder conviction and resulting sentence of death on direct appeal. *McFarland v. State*, 845 S.W.2d 824 (Tex.Cr.App. 1992). The trial court has scheduled Applicant's execution to be carried out on or before sunrise on October 27, 1993.

Applicant has filed a motion to stay the execution to permit the recruitment of counsel for the purposes of researching and filing an application for a writ of habeas corpus. Upon due consideration, Applicant's motion is in all respects denied.

**IT IS SO ORDERED THIS THE 22ND DAY OF
OCTOBER, 1993.**

PER CURIAM

EN BANC

DO NOT PUBLISH

Clinton, Baird and Maloney, JJ., would grant the stay.
Miller, J., not participating

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FRANK BASIL MCFARLAND	§	
Petitioner,	§	
	§	
VS.	§	
JAMES A COLLINS, DIRECTOR	§	NO.
TEXAS DEPARTMENT OF	§	4:93-CV-714-A
CRIMINAL JUSTICE,	§	
INSTITUTIONAL DIVISION	§	
	§	
Respondent.	§	

ORDER

(Filed Oct. 25, 1993)

Came on to be considered in the above styled and numbered action the motions of petitioner, Frank Basil McFarland ("McFarland"), (i) for stay of execution and request for appointment of counsel and (ii) for leave to proceed *in forma pauperis*. After having considered the motions and the response of respondent the court finds that the motions should be denied.

On November 15, 1989, McFarland was convicted of capital murder and sentenced to death in the Criminal District Court Number Three of Tarrant County, Texas, the Honorable Don Leonard presiding. McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). On June 6, 1993, McFarland's petition for writ of certiorari to the United States Supreme Court was denied. McFarland was represented by counsel at each of

the above mentioned stages. On August 16, 1993, Judge Leonard entered an order scheduling McFarland's execution for September 23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to October 27, 1993. On October 22, 1993, McFarland filed the motions presently before the court.

Pursuant to 21 U.S.C. § 848 (g)(4)(B) a defendant in any post-conviction proceeding under 28 U.S.C. § 2254 or § 2255 who is or becomes financially unable to obtain adequate representation is entitled to the appointment of one or more attorneys. In the instant case, however, McFarland is not entitled to such an appointment because there is not "a post-conviction preceding [sic] under section 2254 or 2255 of Title 28" pending. Only when McFarland files such a petition (in complies [sic] with applicable federal and local rules) will the court have authority to grant the motions, if appropriate. *In Re Lindsey*, 875 F.2d 1502, 1504 (11th Cir. 1989). Moreover, because there is not a pending habeas corpus proceeding, the court has no jurisdiction to enter a stay of execution or grant *in forma pauperis* status. *Narvaiz v. Collins*, No. SA4-93-CA-0311 (W. D. Tex. April 21, 1993). McFarland has not provided the court with the "information and materials necessary to make a careful assessment of the merits" to determine whether a stay is warranted. *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). Therefore,

The court ORDERS that the motions of McFarland (i) for stay of execution and request for appointment of

counsel and (ii) for leave to proceed *in forma pauperis* be, and are hereby denied.

SIGNED October 25, 1993.

/s/ JOHN McBRYDE
JOHN McBRYDE
United States District Judge

Certified a true copy of an instrument on file in my office on 10/26/93 NANCY HALL DOHERTY, Clerk, U.S. District Court, Northern District of Texas
By B. Garner Deputy.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FRANK BASIL MCFARLAND	§	
Petitioner,	§	
vs.	§	No. 4:93-CV-714-A
JAMES A. COLLINS, DIRECTOR,	§	(Filed
TEXAS DEPARTMENT OF	§	Oct. 26, 1993)
CRIMINAL JUSTICE,	§	
INSTITUTIONAL DIVISION	§	
Respondent.	§	

ORDER

FRANK BASIL MCFARLAND, who has been designated "Petitioner" in the above numbered proceeding, has filed in such proceeding a document entitled "*Pro Se* Application for Certificate of Probable Cause to Authorize Appeal and Certification that Appeal is in Good Faith" (hereinafter "Application") and another document entitled "Motion for Leave to Proceed *In Forma Pauperis* on Appeal" (hereinafter "Motion"). The Application states that it is being made pursuant to 28 U.S.C. § 2253. Section 2253 applies only to "a habeas corpus proceeding before a circuit or district judge". The proceeding docketed as 4:93-CV-714-A on the docket of this court is not now, and has never been, a habeas corpus proceeding. This was made clear by the order signed by the court October 25, 1993. Thus, the Application should not have been filed in this proceeding. Therefore,

The court ORDERS that the Application be, and is hereby, stricken from the record of No. 4:93-CV-714-A.

For the reasons stated in the order signed by the court October 25, 1993, the Motion should be denied. Therefore,

The court ORDERS that the Motion be, and is hereby, denied.

THE COURT SO ORDERS.

SIGNED October 26, 1993.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

Certified a true copy of an instrument
on file in my office on 10-26-93
NANCY HALL DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By B. Garner Deputy.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANK BASIL McFARLAND,)	
)	
Petitioner,)	CIVIL ACTION
)	NO. _____
vs.)	
JAMES A. COLLINS, Director,)	
Texas Department of Criminal)	
Justice, Institutional Division,)	
)	
Respondent.)	
_____)	

APPLICATION FOR CERTIFICATE OF PROBABLE
CAUSE AND MOTION FOR STAY OF EXECUTION

Petitioner is scheduled to be executed by the
State of Texas shortly after 12:00 a.m. on Octo-
ber 27, 1993.

*MANDY WELCH
JOE MARGULIES
BRENT NEWTON
Texas Resource Center
3223 Smith St., Ste. 215
Houston, Texas 77006
713-522-5917

*Counsel of record

Temporary Counsel for Petitioner¹

¹ Petitioner appeared *pro se* in the court below and in the state habeas courts. Counsel's representation on appeal is limited to the issues related to the denial of Petitioner's right to habeas counsel and access to the courts.

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANK BASIL McFARLAND,)	
)	
Petitioner,)	CIVIL ACTION
)	NO. _____
vs.)	
)	
JAMES A. COLLINS, Director,)	
Texas Department of Criminal)	
Justice, Institutional Division,)	
)	
Respondent.)	
_____)	

APPLICATION FOR CERTIFICATE OF PROBABLE
CAUSE AND MOTION FOR STAY OF EXECUTION

To the Honorable Judges of the Court of Appeals:

Believing that his appeal has merit and raises substantial constitutional questions which are the subject of debate among jurists of reason,² Petitioner respectfully requests that this Court grant his Application for a Certificate of Probable Cause (CPC) for Appeal from the order of the United States District Court for the Northern District of Texas, Fort Worth Division, refusing to stay Petitioner's imminent execution temporarily and appoint Petitioner, an indigent, federal habeas counsel pursuant to 21 U.S.C. § 848(q)(4)(B). (That order is attached to the Brief in Support of this Application as **Appendix A**). Petitioner also moves this Court to stay his execution so that this Court may have sufficient time to deliberate the many important issues raised in this Application.

² See *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

As the accompanying brief in support of this Application and Motion sets forth, there are numerous issues before the Court:

1. Whether Petitioner is automatically entitled to a certificate of probable cause.
2. Whether the district court had jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or The All Writs Act, 28 U.S.C. § 1651(a).
3. Whether, assuming *arguendo* that there was no statutory basis for jurisdiction, the constitution nevertheless required the district court to stay Petitioner's imminent execution so that habeas counsel could be appointed.
4. Whether, at a minimum, this Court should grant a temporary stay to preserve the subject matter of the appeal and so that this Court may exercise its inherent jurisdiction to determine whether it has jurisdiction.

These are substantial issues that warrant a grant of CPC and a stay of execution. The larger equities also favor granting a stay of execution in this case. See *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (habeas corpus "traditionally been regarded as governed by equitable principles"). A first-time indigent *pro se* capital habeas petitioner's attempt to invoke his constitutional and statutory rights to file a habeas corpus petition does not merit such expedited treatment. This is not a case where a habeas petitioner has abused the habeas process or otherwise acted in a dilatory manner. Indeed, Petitioner's direct appeal certiorari petition was denied by the Supreme Court in June of this year.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's Application for a Certificate of Probable Cause and Motion for Stay of Execution.

Respectfully submitted,

FRANK BASIL McFARLAND

By: /s/ Mandy Welch by express
permission Brent E. Newton

*Mandy Welch
Joe Margulies
Brent E. Newton
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917

fax (713) 522-2733
Temporary counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this APPLICATION FOR A CERTIFICATE FOR PROBABLE CAUSE AND MOTION FOR STAY OF EXECUTION has been hand-delivered to:

Enforcement Division
Office of the Attorney General
209 West 14th Street
Price Daniel, Sr. Building
8th Floor
Austin, TX 78701,

this 26th day of October, 1993.

/s/ Mandy Welch
by Express Permission
Brent E. Newton

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1954

FRANK BASIL MCFARLAND,

Petitioner,

VERSUS

JAMES A. COLLINS,
Director, Texas Department of Criminal Justice,
Institution Division,
Respondent.

Appeal from the United States District Court
for the Northern District of Texas

(October 26, 1993)

ON MOTION FOR STAY OF EXECUTION
AND APPOINTMENT OF COUNSEL

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:

Frank B. McFarland seeks *in forma pauperis* status and a certificate of probable cause to review the district court's denial of his application for a stay of execution and for the appointment of counsel to represent him in the filing and prosecution of a complaint for habeas relief. He also seeks from this Court a stay of execution.

We grant IFP but deny certificate of probable cause.

The only post conviction relief petitioner has sought in state court has been a number of motions to stay court ordered executions to permit the petitioner to obtain habeas counsel. The final motion for stay was denied by the Texas Court of Criminal Appeals on October 22. Thus, no post-conviction claims have been filed in state court alleging specific constitutional infirmities in his state court conviction and sentence. The only pleadings McFarland has filed in federal district court is a motion for stay of the state court ordered execution and request for appointment of counsel and a request for certificate of probable cause. McFarland seeks review of the district court's denial of those motions.

A Petitioner does not have a right to an automatic stay pending the filing of his first habeas corpus petition. *Autry v. Estelle*, 464 U.S. 1, 2 (1983). A United States Court may not stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to perfect or effectuate its judgments. 28 U.S.C. § 2283. Such an act of Congress exists in the form of 28 U.S.C. § 2251, but it authorizes stay only by a court before which a habeas corpus proceeding is pending. No habeas corpus proceeding was pending before the district court and none is pending here. A suit is pending when commenced. *In Re Conna-way*, 178 U.S. 421, 427-28 (1900). Federal Rule of Civil Procedure 3 makes it clear one commences a civil proceeding by filing a complaint with the court. That has not been done. We do not view the motion for stay and for appointment of counsel as the equivalent of an application for habeas relief. *Brown v. Vasquez*, 952 F.2d 1164, 1166 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992). We

do not, however, share the view of the Ninth Circuit in *Brown* that the filing of the motions at issue is sufficient to meet the requirement of § 2251 that a habeas proceeding be "pending" before we may stay state court proceedings. *Brown*, 952 F.2d at 1169. In fact, all of the "pro se" filings in this matter, which were prepared by the Texas Resource Center, show clearly that no habeas action is pending in any court.

Were we, by some legal alchemy, to ignore the foregoing, Appellant still could not prevail. He does not make the minimal showing necessary to establish entitlement to a stay. Appellant argues that he is entitled to appointment of counsel, and appointed counsel will require additional time to prepare the habeas petition. There is, however, no constitutional right to court appointed counsel in state post-conviction proceedings. *Coleman v. Thompson*, 111 S.Ct. 2546 (1991); *Murray v. Giarratano*, 492 U.S. 1 (1989). We are not prepared to accept the blanket assertion that, in this case, meaningful access to the courts necessarily means court appointed counsel. *Id.*

Additionally, to be entitled to a stay, Appellant must show, if not a probability of success on the merits, at least a substantial case on the merits when a serious legal question is involved. *Byrne v. Roemer*, 847 F.2d 1130, 1133 (5th Cir. 1988). Appellant has not even indicated the issues that might be raised in a habeas application, much less shown a substantial case on the merits. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).¹

¹ There is yet another problem not addressed by any of Appellant's filings: the question of exhaustion of state remedies.

Accordingly the application for certificate of probable cause is denied. The motion for stay of execution and appointment of counsel is also denied.

Petitioner must exhaust state habeas remedies before he is entitled to relief on a federal habeas petition. 22 U.S.C. § 2254(b) (West 1985); *In Re Lindsey*, 875 F.2d 1502, 1506 (11th Cir. 1989). The numerous attachments to the papers filed show not only that no claims have been exhausted; but no post conviction claims have even been filed in state court. Thus, even if McFarland's pleadings are characterized as a federal habeas petition, the district court would be obliged to dismiss it for failure to exhaust the claims.

AFFIDAVIT OF D'LENE TANNER

BEFORE ME, the undersigned authority, on this day personally appeared D'LENE TANNER, and upon oath did depose and say:

My name is D'Lene Tanner. I am over 21 years of age, have never been convicted of a felony, am fully competent to testify, and have personal knowledge of the facts set forth herein.

I am presently the Felony Appeals Clerk for the District Clerk of Tarrant County, Texas. Part of my duties consist of the care, custody, and control of all court documents filed pursuant to appeals and writs of habeas corpus in Tarrant County, Texas. One of the court files which I have care, custody, and control of is the appeal in the case of *McFarland v. State*, No. 71,016 in the Court of Criminal Appeals.

The conviction and death sentence in that cause was affirmed by the Court of Criminal Appeals on September 23, 1992. Mandate was subsequently issued on March 12, 1993. The United States Supreme Court denied a petition for writ of certiorari in the cause on June 7, 1993.

A review of the records in my charge reveals that the defendant, Frank Basil McFarland, has never filed an application or motion for stay of execution in the trial court. It is the usual and normal practice of the district clerk to place any document filed in a case in the court's jacket with a file mark, to note the date the document was filed, and to enter the filing of the document into the minutes of the court's docket. The court's jacket for the case of *McFarland v. State*, No. 71,016, does not contain a

motion or request for stay of execution filed by the defendant, nor does the court's docket reflect that such a document was ever filed. A certified copy of the court's docket is attached hereto as Exhibit "A."

A review of the habeas corpus actions filed in Tarrant County reveal that Mr. McFarland has not filed a writ of habeas corpus in any Tarrant County court, particularly in the court of conviction, the Criminal District Court No. 3 of Tarrant County, Texas.

The record does contain a letter from Mandy Welch, Executive Director of the Texas Resource Center, addressed to Hon. Don Leonard, the presiding judge of Criminal District Court No. 3 of Tarrant County. This is the only communication, other than court orders, filed in the cause since the defendant's date of execution was set. A certified copy of this letter is attached hereto as Exhibit "B."

FURTHER AFFIANT SAYTH NOT.

/s/ D'Lene Tanner
D'LENE TANNER

STATE OF TEXAS §
COUNTY OF TARRANT §

Sworn to and subscribed before me this 22nd day of October, 1993.

GYPSY ANNE FLENIKEN

(Seal) Notary Public /s/ Gypsy Anne Fleniken
STATE OF TEXAS Notary Public for
The State of Texas

My Comm. Exp. 06/27/97 Commission Expires: 6/27/97

AFFIDAVIT OF EDWARD L. WILKINSON

BEFORE ME, the undersigned authority, on this day personally appeared EDWARD L. WILKINSON, and upon oath did depose and say:

My name is Edward L. Wilkinson. I am over 21 years of age, have never been convicted of a felony, am fully competent to testify, and have personal knowledge of the facts set forth herein.

I am presently an assistant criminal district attorney for Tarrant County, Texas, and have served in that capacity for the past three years. As part of my duties as assistant criminal district attorney, I supervise all State's Responses to criminal writs of habeas corpus filed in Tarrant County, Texas. I am also the attorney of record in the case of *McFarland v. State*, No. 71,016.

On September 20, 1993, I talked via telephone with a representative of the Texas Resource Center, the Hon. Mandy Welch, regarding a stay of execution for Frank McFarland. Mr. McFarland's execution was then set for September 23, 1993. I explained to Ms. Welch that it was the State's position that under Rule 233 of the Texas Rules of Appellate Procedure a trial court lacked jurisdiction to issue a stay or withdraw an order setting execution absent the filing of a writ of habeas corpus under Article 11.07 of the Code of Criminal Procedure. I specifically informed her that if a writ of habeas corpus were filed, that the State would not only not oppose a stay, but that it would agree to it. Ms. Welch advised me that the Resource Center did not agree, and informed that several

other representatives of the Resource Center would personally seek and order from the court staying the execution.

Representatives of the Resource Center, the Hon. Maurie Levin and Annette M. Lamoreaux, came to my office that afternoon. I informed them that the presiding judge of the convicting court, Criminal District Court Three, was not available. They informed me that they would therefore instead seek a stay from the judge of Criminal District Court Four.

I appeared at a hearing in chambers of the Criminal District Court Four. I agreed on behalf of the State to reset the execution until October 27, 1993, so that the Resource Center could present its request for a stay to the presiding judge of Criminal District Court Three. At this hearing I again reiterated that the State did not oppose a stay in the event that a writ of habeas corpus were filed before, or contemporaneous with, a request for a stay.

I was contacted on either on [sic] September 13 or 14, 1993, by yet another member of the Resource Center. He asked if the State had changed its position. I replied that it had not, that it still maintained that the trial court had no jurisdiction to grant a stay absent the filing of a writ of habeas corpus.

The State's position even now remains the same: the State will not oppose, and in fact will agree to, a stay of execution if an application for writ of habeas corpus is properly filed in the cause.

FURTHER AFFIANT SAYTH NOT.

/s/ Edward L. Wilkinson
EDWARD L. WILKINSON

STATE OF TEXAS §
COUNTY OF TARRANT §

Sworn to and subscribed before me this 22nd day of October, 1993.

GYPSY ANNE FLENIKEN

(Seal) Notary Public /s/ Gypsy Anne Fleniken
STATE OF TEXAS Notary Public for
The State of Texas
Commission Expires: 6/27/97

My Comm. Exp. 06/27/97
w17:102293b.mi

AFFIDAVIT OF CHARLES M. MALLIN

BEFORE ME, the undersigned authority, on this day personally appeared CHARLES M. MALLIN upon oath did depose and say:

My name is CHARLES M. MALLIN. I am over 21 years of age, have never been convicted of a felony, am fully competent to testify, and have personal knowledge of the facts set forth herein.

I am presently an assistant criminal district attorney for Tarrant County, Texas, and sever [sic] as the assistant chief of the appellate division. I have been employed by the Tarrant County District Attorney's Office for approximately three years.

In the course of my employment I have become familiar with the case of *Frank Basil McFarland v. State of Texas*. My involvement commenced when the case was affirmed by the Court of Criminal Appeals and the trial court, Don Leonard, Judge of Criminal District Court No. 3 of Tarrant County set an execution date after the mandate was issued. On at least one occasion, since the mandate issued on March 12, 1993, I communicated to a member of the Texas Resource Center that the Tarrant County District Attorney's office would not oppose a stay of execution, if the center would first file Mr. McFarland's post conviction writ of habeas corpus, pursuant to Tex. Code Crim. Proc. Ann. art. 11.07.

FURTHER AFFIANT SAYTH NOT.

/s/ Charles M. Mallin
AFFIANT

STATE OF TEXAS §
COUNTY OF TARRANT §

Sworn to and subscribed before me this 22nd day of October, 1993.

GYPSY ANNE FLENIKEN

(Seal) Notary Public /s/ Gypsy Anne Fleniken
STATE OF TEXAS Notary Public for
The State of Texas

Commission Expires: 6/27/97

My Comm. Exp. 06/27/97
w17:102293b.mi

AFFIDAVIT OF AFFIDAVIT OF BETTY MARSHALL

BEFORE ME, the undersigned authority, on this day personally appeared BETTY MARSHALL, and upon oath did depose and say:

My name is Betty Marshall. I am over 21 years of age, have never been convicted of a felony, am fully competent to testify, and have personal knowledge of the facts set forth herein.

I am presently the assistant chief of the appellate division of the Tarrant County District Attorney's office.

On September 20, 1993, I received a telephone call from Eden Harrington, the executive director of the Texas Resource Center. She asked me to agree, on behalf of the State, to a stay of execution in the case of Frank Basil McFarland, who was then set for execution on September 23, 1993. I informed her that the State maintained that the trial court had no jurisdiction to enter a stay of execution or withdraw its order setting execution unless a writ of habeas corpus had been filed in the cause. I further assured her that if an application for writ of habeas corpus were filed on Mr. McFarland's behalf, the State would agree to a stay of execution by the trial court.

I have had no further discussions on the matter with Ms. Harrington or anyone else from the Resource Center.

FURTHER AFFIANT SAYTH NOT.

/s/ Betty Marshall
BETTY MARSHALL

Sworn to and subscribed before me this 22nd day of October, 1993.

GYPSY ANNE FLENIKEN

(Seal) Notary Public /s/ Gypsy Anne Fleniken
STATE OF TEXAS Notary Public for
The State of Texas
Commission Expires: 6/27/97
My Comm. Exp. 06/27/97

CLERK'S OFFICE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that on *January 19, 1993*, the Texas Resource Center checked out from this office the direct appeal, styled *Frank B. McFarland*, Case number *71,016* and returned same on *January 25, 1993*.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas, this the 22nd day of October, A. D., 1993.

(Seal)

/s/ Thomas Lowe
Thomas Lowe, Clerk
County of Criminal Appeals

By: /s/ Abel Acosta
Abel Acosta
Deputy Clerk

NAME: Frank B. McFarland CCRA# 71,016

CHECKED OUT BY: /s/ Jorge Delgada DATE: 1/19-93

RETURNED BY: /s/ Jorge Delgada DATE: 1/25/93

CHECKED OUT BY: _____ DATE: _____

RETURNED BY: _____ DATE: _____

CHECKED OUT BY: _____ DATE: _____

RETURNED BY: _____ DATE: _____

SUPREME COURT OF THE UNITED STATES

No. 93-6497

Frank B. McFarland,

Petitioner

v.

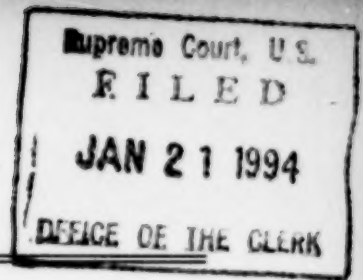
James A Collins, Director, Texas Department
of Criminal Justice, Institutional Division

ON PETITION FOR WRIT OF CERTIORARI to the
United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition.

November 29, 1993

8
No. 93-6497



In The
Supreme Court of the United States
October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari
To The Fifth Circuit Court Of Appeals

PETITIONER'S BRIEF

*MANDY WELCH
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
fax (713) 522-2733

*Counsel of record

DOUGLAS G. ROBINSON
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7800
fax (202) 393-5760

QUESTION PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651(a), in order to appoint counsel for an indigent *pro se* death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below and Jurisdictional Statement	1
Constitutional and Statutory Provisions at Issue	1
Statement of the Case	1
Summary of Argument	15
Argument	19
I. THE PAPERS FILED BY MR. McFARLAND IN THE DISTRICT COURT MARKED THE BEGINNING OF HIS HABEAS CORPUS PROCEEDING, TRIGGERED HIS RIGHT TO COUNSEL AND GAVE THE DISTRICT COURT JURISDICTION TO STAY HIS EXECUTION	19
II. THE ALL WRITS ACT, 28 U.S.C. § 1651(a), GAVE THE DISTRICT COURT AUTHORITY TO GRANT A STAY AND APPOINT COUNSEL ..	36
III. THE ANTI-INJUNCTION ACT, 28 U.S.C. § 2283, DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION OR AUTHORITY TO STAY MR. McFARLAND'S EXECUTION	42
Conclusion	50

TABLE OF AUTHORITIES

Page

CASES

<i>Airlines Reporting Corp. v. Barry</i> , 825 F.2d 1220 (8th Cir. 1987)	44
<i>Atchison, T. & S.F. R. Co. v. Buell</i> , 480 U.S. 557 (1987)	23
<i>Baines v. City of Danville</i> , 337 F.2d 579 (4th Cir. 1964)	44
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	31, 40, 41
<i>Brown v. Allen</i> , 344 U.S. 443 (1954)	40
<i>Brown v. Vasquez</i> , 743 F. Supp. 729 (C.D. Cal. 1990), <i>aff'd on other grounds</i> , 952 F.2d 1164 (9th Cir. 1991)	35, 39
<i>Brown v. Vasquez</i> , 952 F.2d 1164 (9th Cir. 1991), <i>cert. denied</i> , 112 S.Ct. 1778 (1992)	12, 15
<i>Clark v. Busey</i> , 959 F.2d 808 (9th Cir. 1992)	37
<i>Cole v. Texas</i> , 499 U.S. 1301 (1991)	2
<i>Coleman v. Thompson</i> , ___ U.S. ___, 112 S. Ct. 1845 (1992)	25
<i>Erlenbaugh v. United States</i> , 409 U.S. 239 (1972) ...	33, 49
<i>Essanay Film Manufacturing Co. v. Kane</i> , 258 U.S. 358 (1922)	44
<i>FTC v. Dean Foods Co.</i> , 384 U.S. 597 (1965), <i>modified on other grounds</i> , <i>Sampson v. Murray</i> , 415 U.S. 61 (1974)	37
<i>Frank v. Mangum</i> , 237 U.S. 309 (1915)	35
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	29

TABLE OF AUTHORITIES – Continued

	Page
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977).....	28
<i>General Railway Signal Co. v. Corcoran</i> , 921 F.2d 700 (7th Cir. 1991).....	48
<i>Gloucester M.R. Corp. v. Charles Parisi, Inc.</i> , 848 F.2d 12 (1st Cir. 1988).....	43
<i>Gosch v. Collins</i> , No. SA-93-CA-731 (W.D. Tex. Sept. 15, 1993).....	<i>passim</i>
<i>Gosch v. Collins</i> , No. SA-93-CA-736 (W.D. Tex. Oct. 12, 1993).....	7
<i>Harris v. Nelson</i> , 394 U.S. 286 (1969)....	18, 35, 37, 39, 41
<i>Hensley v. Municipal Court</i> , 411 U.S. 345 (1973)	35
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	26
<i>ITT Community Develop. Corp. v. Barton</i> , 569 F.2d 1351 (5th Cir. 1978).....	37
<i>In re Baldwin-United Corporation</i> , 770 F.2d 328 (2d Cir. 1985)	48
<i>In re Joint Eastern & Southern District Asbestos Liti- gation</i> , 134 F.R.D. 32 (E.& S.D.N.Y. 1990)	47
<i>Jennings v. Boenning & Co.</i> , 482 F.2d 1128 (3d Cir. 1973).....	48
<i>Kline v. Burke Construction Co.</i> , 260 U.S. 226 (1922)	48
<i>Land v. Florida</i> , 377 U.S. 959 (1964).....	38
<i>Leiter Minerals, Inc. v. United States</i> , 352 U.S. 220 (1957)	44
<i>Lenhard v. Wolff</i> , 443 U.S. 1306 (1979)	38
<i>McClellan v. Carland</i> , 217 U.S. 268 (1910)	37
<i>McCleskey v. Zant</i> , 499 U.S. 467 (1991).....	25, 35

TABLE OF AUTHORITIES – Continued

	Page
<i>McFarland v. Collins</i> , 7 F.3d 47 (5th Cir. 1993)	14, 15
<i>McFarland v. Texas</i> , 113 S.Ct. 2937 (1993)	8
<i>McFarland v. State</i> , 845 S.W.2d 824 (Tex. Crim. App. 1992)	8
<i>Mitchum v. Foster</i> , 407 U.S. 225 (1972)	42, 43, 45, 46
<i>Murray v. Giarratano</i> , 492 U.S. 1 (1989)	21, 24, 26
<i>Northcross v. Board of Education</i> , 412 U.S. 427 (1973)	33, 49
<i>O'Bryan v. McKaskle</i> , 729 F.2d 991 (5th Cir. 1984)	31
<i>Pennsylvania Bureau of Correction v. United States Marshall's Service</i> , 474 U.S. 34 (1985)	36, 40
<i>Price v. Johnson</i> , 334 U.S. 266 (1948)	35
<i>Re: Moody Aircraft, Inc.</i> , 730 F.2d 367 (5th Cir. 1984)	44
<i>Republican State Central Committee of Arizona v. Ripon Society</i> , 409 U.S. 1222 (1972)	37
<i>Roche v. Evaporated Milk Association</i> , 319 U.S. 21 (1943)	37
<i>S.E.C. v. C.M. Joiner Leasing Corp.</i> , 320 U.S. 344 (1943)	23
<i>Selvage v. Lynaugh</i> , 842 F.2d 89 (5th Cir. 1988)	31
<i>Smith v. Apple</i> , 264 U.S. 274 (1924)	43, 44
<i>Strickland v. Washington</i> , 466 U.S. 668 (1983)	26
<i>Toucey v. New York Life Insurance Co.</i> , 314 U.S. 118 (1941)	42, 43
<i>Treinies v. Sunshine Mining Co.</i> , 308 U.S. 66 (1939)	44
<i>United States v. Stewart</i> , 311 U.S. 60 (1940)	49
<i>Wells Fargo & Co. v. Taylor</i> , 254 U.S. 175 (1920)....	42, 44

TABLE OF AUTHORITIES - Continued

Page

<i>West Virginia University Hospital v. Casey</i> , 111 S. Ct. 1138 (1991).....	33
<i>Woodward v. Hutchins</i> , 464 U.S. 377 (1984).....	38
<i>Wright v. West</i> , 112 S. Ct. 2482 (1992).....	22
<i>Younger v. Harris</i> , 401 U.S. 37 (1971).....	43, 44

STATUTES

18 U.S.C. § 3006A	4
21 U.S.C. § 848(q)	<i>passim</i>
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1651(a)	1, 18, 36, 47
28 U.S.C. § 2251.....	<i>passim</i>
28 U.S.C. § 2254.....	<i>passim</i>
28 U.S.C. § 2255.....	13
28 U.S.C. § 2283.....	<i>passim</i>
Sup. Ct. R. 24.1(f)	1
Fed. R. Civ. Pro. 3.....	35, 36
Fed. R. Civ. Pro. 41(a)	14

MISCELLANEOUS

Spangenberg Group, <i>A Study of Representation of Capital Cases in Texas</i> (March 1993).....	2, 11
William T. Mayton, <i>Ersatz Federalism Under the Anti-Injunction Statute</i> , 78 Colum. L. Rev. 330, 363 (1978).....	48

TABLE OF AUTHORITIES - Continued

Page

17 Federal Practice & Procedure, § 4224, at 521-22 (1978 & 1987)	46
19 Fed. Proc. L. Ed. § 47:97, at 506	48
1A Moore's Federal Practice § 0.208, at 2313-14 ..	44, 48
Hon. Edith Jones, <i>Death Penalty Procedures: A Proposal for Reform</i> , 53 Tex. Bar J. 850, 851 (1990).....	2
Wright, Miller & Cooper, <i>FEDERAL PRACTICE & PROCEDURE</i> § 4221 at 499-500 (1978 & 1987)	43, 44

OPINION BELOW AND JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit, affirming the order of the United States District Court for the Northern District of Texas denying a stay of execution and appointment of counsel, was entered on October 26, 1993, *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993). The petition for certiorari was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the following federal statutes, copies of which are attached as an appendix, pursuant to Sup. Ct. R. 24.1(f): 21 U.S.C. § 848(q), 28 U.S.C. § 1651, 28 U.S.C. § 2251, 28 U.S.C. § 2254, and 28 U.S.C. § 2283.

STATEMENT OF THE CASE

A. The Unavailability of Counsel for Post Conviction Representation in Texas

Bench and bar now generally recognize that not every indigent Texas death row inmate can be assured of having counsel available to represent him in state or federal post conviction proceedings. Unlike many states, Texas has not established a "public defender" to represent condemned prisoners in such actions; nor is there a state right to post conviction counsel. Private attorneys

who can be recruited to represent death row prisoners in state habeas proceedings are almost never compensated. The number of unrepresented death row prisoners is substantially increasing and the number of private attorneys able and willing to undertake this difficult and complex work *pro bono* is not. At the same time, Texas trial courts are setting execution dates for unrepresented inmates in record numbers, and there is no assurance that recruited counsel will be given sufficient time to provide adequate representation before a prisoner is executed. See Spangenberg Group, *A Study of Representation of Capital Cases in Texas* (March 1993) [hereafter referred to as the "Spangenberg Report"].

Judge Edith Jones of the Fifth Circuit cautioned more than three years ago that "the growing death row population [in Texas] requires increased counsel resources, while the present system discourages the appointment of counsel." Hon. Edith Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. BAR J. 850, 851 (1990). Judge Jones recognized that Texas not only fails to require counsel in habeas proceedings, but actively discourages the recruitment of attorneys by practicing, in her words, "[d]ocket control by execution date." *Id.* That is, Texas courts set execution dates for unrepresented inmates promptly after the direct appeal is final and use execution dates as filing deadlines throughout the post conviction process.¹ As

¹ The Court has experienced firsthand the disorder created by Texas' practice of setting execution dates at such an early stage. In *Cole v. Texas*, 499 U.S. 1301 (1991), Justice Scalia stayed an execution scheduled to occur before the Court could consider the case on direct review, and advised the State that he would stay any scheduled execution under such circumstances. *Id.*

Judge Jones noted, trying to force the filing of state and federal habeas petitions by setting execution dates before post conviction counsel can be obtained makes it nearly impossible to find counsel who are willing and able to do the work that is necessary to ensure "thorough and adequate review by state and federal courts." *Id.*

A study of the Texas system commissioned by the Texas State Bar in the spring of 1990 has thoroughly documented the problems identified by Judge Jones. The report, issued in March 1993, concluded that "the problems [of representation in post conviction proceedings] in Texas far outweigh those in any other death penalty state in the country." Spangenberg Report at iii. The problem, it continued, was largely due to the fact that, while Texas district judges have discretion to appoint counsel and compensate them in state habeas proceedings, they almost never do so. *Id.* at vii. As the report found, the resulting situation has passed "the crisis level and requires immediate attention." *Id.* at ix. The report recommended several reforms.² None has been adopted.

Despite this admonition, Texas trial courts continue to set execution dates before the Court has considered a timely filed petition for writ of certiorari, and both those courts and the Court of Criminal Appeals routinely deny requests (based on *Cole*) for a stay of execution. This obdurate refusal forces inmates to bring their request to the Court, which routinely stays the execution, but not before the petitioner has been forced to litigate the issue through three levels of the state and federal courts.

² The recommendations included, *inter alia*, that (1) the State pay private attorneys to represent death row prisoners in state habeas proceedings, (2) the State establish an organization of full-time attorneys to represent death row prisoners in state

The lack of counsel and the inability to obtain counsel has forced many prisoners during the past two years to seek stays of execution and appointment of counsel from federal courts to preserve the right to challenge their convictions and death sentences under 28 U.S.C. § 2254 *et seq.* These inmates have been assisted by the Texas Resource Center, a non-profit law office established to ensure that indigent death row inmates in Texas have legal representation in state and federal habeas corpus appeals.³ JA 6.

Until recently, if the Texas courts refused to stay an imminent execution for an unrepresented death row inmate and if the Center's and others' efforts to recruit

habeas proceedings, and (3) the courts defer issuing execution warrants until a prisoner has completed one full round of review, including state and federal habeas corpus proceedings. *Id.* at 166-68.

³ The federal district courts in Texas have designated the Texas Resource Center as a Community Defender Organization in accordance with 18 U.S.C. § 3006A for the purpose of providing "representation, assistance, information, and other related services to eligible persons and appointed attorneys in connection with federal death penalty habeas corpus cases pursuant to subsection (g)(2)(B) of [the Criminal Justice Act]." Addendum to the Plan for the Implementation of the Criminal Justice Act of 1964, As Amended, 18 U.S.C. § 3006A, of the United States District Court of the Northern, Eastern, Southern and Western Districts of Texas. Pursuant to this designation, the Resource Center is required to screen and recruit qualified members of the private bar who are willing to provide representation in death penalty post conviction proceedings in federal court. In addition the Resource Center is "authorized to serve as counsel of record, and shall recommend to the Court those cases in which its appointment as counsel of record is appropriate." Addendum to [CJA] Plan, par. 5(d).

counsel failed and execution was imminent, the Center would assist the inmate in preparing and filing a perfunctory habeas petition in federal court.⁴ Such a petition typically presented a single exhausted claim taken verbatim from the direct appeal brief. The perfunctory petition accompanied an application for appointment of counsel and for a stay of execution, requesting sufficient time for appointed counsel to review the record, conduct appropriate research and investigation, and prepare a real habeas petition. This procedure was devised to accommodate the State's position that a pleading designated a "petition" had to be filed to give the federal courts jurisdiction to enter a stay; the State routinely agreed not to oppose a stay if such a perfunctory "petition" were filed.⁵

⁴ The Center is funded primarily by a grant from the Administrative Office of the United States Courts. The funding and staffing under that grant require that the majority of the Center's time and resources be devoted to providing consultation, information, litigation assistance and other related services to recruited and appointed attorneys in capital federal habeas corpus proceedings. Although the Center provides direct representation to a small number of inmates, it does not have the staff and resources needed to represent all Texas death row prisoners whose cases are in or entering the post conviction stage. Moreover, the Center has never been assigned, nor been able to serve, that function. See JA 46-47.

⁵ See, e.g., JA 73. Over the last 18 months, the filing of a perfunctory petition resulted in a stay and appointment of counsel in a number of cases. See JA 55-68. In each case, the petitioner informed the court that the perfunctory petition was being filed in response to the State's objections regarding the court's jurisdiction to enter a stay and appoint counsel. In each case a stay was entered without opposition once the "petition" was filed. Where available, counsel was appointed and given

Although awkward, this practice allowed Texas death row prisoners to avoid execution before having an opportunity to file even their first habeas petition. The practice was abruptly derailed this past fall, however, by the case of *Gosch v. Collins*, No. SA-93-CA-731 (W.D. Tex. Sept. 15, 1993).

In *Gosch*, as in many other recent cases, the trial court set an execution date shortly after this Court denied Mr. Gosch's certiorari petition from direct appeal. After unsuccessfully asking the state courts for a stay, the Center, acting as temporary counsel, filed a perfunctory petition in the United States District Court for the Western District of Texas and requested a stay and appointment of counsel. The Center informed the Court that the "petition" did not reflect any legal research, transcript review, or other development of Gosch's claims for relief, but merely asserted a single claim raised in his direct appeal. The Center explained the State's position that the Court's jurisdiction to grant a stay depended upon the filing of such a document. Further, the Center pointed out that a stay was necessary to provide sufficient time to appoint counsel and to give appointed counsel an opportunity to investigate, research, prepare and file a proper habeas petition. Petition, at 3-4, *Gosch v. Collins*, (WD Tex. 1993) (No. SA 93-CA-731).

additional time to prepare a properly investigated and researched amended habeas petition. See JA 60-61, 66. Where recruited counsel was not available, the Center was given additional time to recruit an attorney who was then appointed and given additional time to file a proper amended habeas petition. See JA 59, 62, 67.

Following the procedure established during the previous two years, the State did not oppose the issuance of a stay once Mr. Gosch filed his one-issue "petition." Nevertheless, the district court treated the perfunctory habeas petition as if it represented a complete petition raising all the constitutional claims available to Mr. Gosch and denied relief *on the merits*, denying a stay as well. The Fifth Circuit affirmed, see *Gosch v. Collins*, 1993 U.S. App. Lexis 29086 (5th Cir. Sept. 16, 1993). Mr. Gosch's petition for certiorari is presently pending in this Court. *Gosch v. Collins*, No. 93-6025 (filed Sept. 16, 1993).

Thus, *Gosch* dynamited the rough compromise theretofore achieved by the Resource Center and the State, under which the filing of a perfunctory petition permitted a federal district court to issue a stay and appoint counsel. The Fifth Circuit's opinion in *Gosch* permits – even encourages – a federal district court to examine a perfunctory "petition," filed only to meet the State's jurisdictional objections, and deny it on the merits. In that event, no stay would issue. Equally important, even if the prisoner somehow avoids immediate execution, any subsequent petition he attempts to file in federal court may be treated as a successor petition subject to summary dismissal.⁶

⁶ This is precisely what occurred in *Gosch*, where the district court dismissed a second petition in part because it constituted an abuse of the writ. *Gosch v. Collins*, No. SA-93-CA-736 (W.D. Tex. Oct. 12, 1993).

B. Mr. McFarland's State Court Proceedings

1. Trial and Direct Appeal

On November 13, 1989, Mr. McFarland was convicted of capital murder in Criminal District Court No. 3, Tarrant County, Texas. Following a sentencing hearing, he was sentenced to death. The Texas Court of Criminal Appeals affirmed his conviction and sentence, denying rehearing December 9, 1992. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). This Court denied review June 7, 1993. *McFarland v. Texas*, 113 S. Ct. 2937 (1993).

2. Proceedings in State Court after Affirmance

On August 16, 1993, Hon. Don Leonard, presiding in Criminal District Court No. 3 of Tarrant County, ordered that Mr. McFarland be executed on September 23, 1993. JA 3.

On September 19, 1993, a Resource Center attorney presented Mr. McFarland's written *pro se* motion to Hon. Joe Drago, Criminal District Judge of Tarrant County, asking the court to stay or withdraw its September 23, 1993, execution date so that the Center could recruit counsel to represent Mr. McFarland in a state habeas corpus proceeding.⁷ A letter from the Center's executive

⁷ This *pro se* motion, which was presented to Judge Drago in the absence of Judge Leonard, does not appear in the record below. However the *pro se* motion is mentioned in two letters to Judge Leonard, JA 6, 16, and in Judge Drago's order modifying Mr. McFarland's execution date to October 27, 1993. JA 12.

director supporting Mr. McFarland's motion was also presented to Judge Drago. See JA 6. That letter asked the court to "withdraw [the] execution date, allow [the Center] sufficient time to recruit counsel [for Mr. McFarland], and grant new counsel at least 120 days to investigate, research, prepare and file [a] habeas petition." JA 6-7. Anticipating the State's argument (made in other cases) that a request for stay to recruit counsel was unnecessary and a "delaying tactic," *id.*, the letter described the circumstances that had made it impossible for the Center to recruit counsel for Mr. McFarland any earlier:

[R]epresentation of death row inmates in habeas proceedings is in crisis because (1) counsel in state habeas proceedings are generally not compensated; (2) the number of death row inmates needing post conviction representation is substantially increasing each year; and (3) the number of private attorneys willing and able to make the sacrifice of time and resources required by these cases is decreasing.

JA 7-8. The letter also explained that the Center could not represent Mr. McFarland directly because of its lack of staff and resources and its obligations in other cases. JA 9.

The State opposed a stay, arguing that the court had no jurisdiction to enter a stay unless a petition for writ of habeas corpus actually had been filed. Appendix K to Opposition to Pet. App. for Stay of Execution (dated October 25, 1993). On September 20, 1993, Judge Drago modified the execution date, moving it back 34 days to October 27, 1993, but declined to appoint counsel or provide the time requested for the recruitment of counsel. JA 12.

The Center was unable to recruit counsel over the next four weeks, and on October 16 reported its lack of success to the state court:

Simply put, no competent lawyer will take on a highly complex case pro bono, where literally, life is at stake, without adequate time to prepare it. . . . There is no realistic prospect of success of recruiting counsel for Mr. McFarland so long as he continually faces an execution date less than a month away and there are no assurances that recruited counsel will be given sufficient time to prepare a proper habeas petition.

JA 17. The Center renewed Mr. McFarland's request for a stay to allow for the recruitment of counsel and asked the court to exercise its discretionary power under state law to appoint counsel to reduce substantially the recruiting difficulties. *Id.* The court refused to modify or withdraw Mr. McFarland's execution date.

On October 21, 1993, Mr. McFarland filed a *pro se* motion in the Court of Criminal Appeals, requesting that the Court remand the case to the district court with instructions to allow time for the Center to recruit an attorney. JA 21. The Center supported Mr. McFarland's motion and asked the Court to reconsider its approach to requests by *pro se* inmates for stays of execution to obtain habeas counsel. JA 24.⁸ The Center asked the Court to

⁸ The Center noted that when district judges had "enter[ed] scheduling orders specifying the recruiting deadline and providing a later deadline for the filing of an application . . . [i]n most cases . . . the Center has met the recruitment deadline and the recruited attorney has met the filing deadline." JA 25.

stay Mr. McFarland's execution and to [grant] 120 days to recruit counsel, order the district court to order payment of counsel at a reasonable hourly rate, and allow recruited or appointed counsel 120 days in which to file a state habeas application.

JA 28.

A divided Court of Criminal Appeals denied the stay without comment. JA 40. Judge Clinton dissented, urging his colleagues:

"[S]crew your courage to the sticking place," W. Shakespeare, *MacBeth*, I. vii. 10, and confront head on "the crisis stage in capital representation" in this State.

Ex parte McFarland, No. 25, 518-01 (Tex. Ct. Crim. App., October 22, 1993) (dissenting opinion) (citing and quoting Spangenberg Group, *A Study of Representation of Capital Cases in Texas*, (State Bar of Texas) at i-ii).

On October 23, Mr. McFarland filed a petition for writ of certiorari in this Court, seeking review of the Court of Criminal Appeals' refusal to appoint counsel in his case. *McFarland v. Texas*, No. 93-6483. That petition was subsequently denied. *Id.*, ___ U.S. ___, 114 S.Ct. 575 (1993).

C. This Action

On October 22, 1993, Mr. McFarland filed a *pro se* motion in the United States District Court for the Northern District of Texas requesting a stay of his October 27 execution, appointment of qualified counsel, and a reasonable time for counsel to prepare and file a federal habeas petition. JA 41. Mr. McFarland stated, *inter alia*:

I am scheduled to be executed October 27, 1993, and do not have a lawyer to represent me. . . . [The Center] has told me that it cannot represent me directly. . . . I wish to challenge my conviction and sentence under 28 U.S.C. § 2254. . . . I am entitled to the assistance of counsel under 21 U.S.C. § 848(q)(4)(B) . . . [and] unless this Court grants a stay of execution, the right to counsel will become meaningless. . . . [T]his Court has jurisdiction to stay my execution under *Brown v. Vasquez* 952 F.2d 1164 (9th Cir. 1991) . . . [and] even apart from my right to counsel, this Court is required under 28 U.S.C. § 2254 to conduct a meaningful review of my conviction and sentence, a review that cannot take place before my scheduled execution.

Id. The Center, which assisted Mr. McFarland in preparing his motion, supported the request for stay and appointment of counsel in an accompanying letter.⁹

By letter dated October 24, 1993, the Center provided the district court with a copy of the Court of Criminal Appeals' order denying a stay and suggested that the court hold "a scheduling conference with respect to Mr. McFarland's federal habeas proceeding." JA 74. The letter described the Center's prior practice of filing perfunctory habeas petitions on behalf of unrepresented inmates and explained why the Fifth Circuit's ruling in *Gosch* rendered that approach unavailable in Mr. McFarland's case:

⁹ The letter explained that in several other cases federal judges in Texas had exercised their jurisdiction to grant a stay of execution in order to permit time to locate counsel and that in each case the Center subsequently found counsel within the time allotted by the court (usually 100-120 days). JA 50-54.

[I]n light of *Gosch* we do not feel that we can file a perfunctory petition in Mr. McFarland's case without an assurance that it will be recognized for what it is and not become Mr. McFarland's only vehicle for federal review of his conviction and death sentence. We do not represent Mr. McFarland, and under the circumstances, I feel very strongly that we should not take any action that makes it appear that he has counsel when in fact he does not. At the same time, we want to cooperate with the Court and the Attorney General to assure that Mr. McFarland has qualified counsel who is given sufficient time and resources to represent him properly. In this regard, I request that the Court schedule a conference that includes a Resource Center attorney and someone from the Attorney General's office to discuss an appropriate resolution of our dilemma.

Id.

On October 25, the district court denied the motion for stay and appointment of counsel, concluding that "McFarland is not entitled to [appointment of counsel] because there is not a 'post conviction preceding [sic] under section 2254 or 2255 of Title 28' pending" and, further, that "because there is not a pending habeas corpus proceeding, the court has no jurisdiction to enter a stay of execution. . . ." JA 77. The following day, the district court denied Mr. McFarland's application for certificate of probable cause, holding that the instant proceeding "is not now, and has never been, a habeas corpus proceeding." JA 79.

Mr. McFarland immediately filed an application for certificate of probable cause and a motion for stay of execution with the Fifth Circuit, with attorneys from the Center appearing as temporary counsel for purposes of the appeal. JA 81. The Fifth Circuit denied the application and motion on the evening of October 26, 1993,¹⁰ holding, first, that the Anti-Injunction Act barred the relief requested. *McFarland v. Collins*, 7 F.3d 47, 48 (5th Cir. 1993). Although the court noted that Congress expressly authorized the federal courts to enjoin state proceedings under 28 U.S.C. § 2251, it found § 2251 inapplicable because no habeas petition was "pending" before the district court and "none is pending here." *Id.* at 49. The court concluded that a habeas proceeding is "pending"

¹⁰ Shortly before the Fifth Circuit ruled, federal district court personnel contacted a Fort Worth attorney, Danny D. Burns, and asked him whether he would accept appointment in Mr. McFarland's case; Mr. Burns said that he would. Later, district court personnel told Mr. Burns that the court did not have jurisdiction to appoint him but that the court might grant a stay and appoint him if he were to file a document entitled a "petition for writ of habeas corpus" and agree to represent the petitioner. Concluding that the risk of filing such a perfunctory petition (*see Gosch v. Collins, supra*) was outweighed by the risk that no stay at all would issue, Mr. Burns complied. The district court thereupon denied the stay based on the merits of the incomplete, one-issue petition. *McFarland v. Collins*, No. 4:93-CV-723-A (W.D. Tex. Oct. 26, 1993). On appeal a divided Fifth Circuit issued a stay (at virtually the same moment this Court did). *McFarland v. Collins*, 8 F.3d 258 (5th Cir. 1993). Mr. Burns later dismissed the perfunctory petition under FED. R. CIV. PRO. 41(a) so that a later-filed, complete petition would not be deemed an abuse of the writ. The Fifth Circuit then dismissed the appeal and lifted its stay as moot. *McFarland v. Collins*, 8 F.3d 256 (5th Cir. 1993).

only "when commenced" by an application for habeas relief and that a "motion for stay and for appointment of counsel [is not] the equivalent of an application for habeas relief." *Id.*¹¹

A petition for writ of certiorari was immediately filed in this Court. At 11:50 p.m. (Central time), the Court granted a stay of execution. *McFarland v. Collins*, ___ U.S. ___, 114 S. Ct. 374 (1993). The petition was granted on November 22, 1993, limited to Question 2 therein. *McFarland v. Collins*, ___ U.S. ___, 126 L. Ed.2d 446 (1993).

SUMMARY OF ARGUMENT

Within five days of his scheduled execution, Mr. McFarland filed a *pro se* motion in the federal district court making clear his resolve to challenge his conviction and death sentence through a petition for writ of habeas corpus under 28 U.S.C. § 2254. He explained, however,

¹¹ In rejecting Mr. McFarland's argument that § 2251 applied, the court said that it did not "share the view" of the Ninth Circuit in *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1778 (1992), which held that § 2251 did apply in similar circumstances. *McFarland*, 7 F.3d at 49. The court also rejected Mr. McFarland's argument, not at issue here, that a stay of execution and appointment of counsel were necessary to provide him meaningful access to the courts. *Id.* Finally, the court held that because no habeas petition had been filed, Mr. McFarland was unable to show a probability of success on the merits. *Id.* In a footnote, the court observed, incorrectly, that none of Mr. McFarland's possible claims in a federal habeas petition had been exhausted in state court. *Id.* at 49 n.1.

that he did not have a lawyer and that he was unable to retain a lawyer because of his indigency, and unable to prepare and file a petition for himself that would adequately account for and present all the potentially meritorious constitutional claims in his case. He explained further that he had been unrepresented since the denial of his petition for writ of certiorari on direct appeal and that the state courts had refused to appoint counsel for state habeas proceedings. As a result, he was unable to prepare and file a state habeas petition. He asked that the federal district court stay his execution and appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B) to enable him to file a federal habeas petition.

The threshold question presented by this case is whether the *pro se* pleading filed by Mr. McFarland commenced a federal habeas proceeding. If it did, the lower courts clearly erred in refusing to stay Mr. McFarland's execution and appoint counsel pursuant to 28 U.S.C. § 2251 and 21 U.S.C. § 848(q)(4)(B). If it did not, the lower courts were still in error, for there was ample authority under the All Writs Act, 28 U.S.C. § 1651(a), for the district court to grant a stay and appoint counsel.

Congress' intent in enacting 21 U.S.C. § 848(q)(4)(B) is determinative of whether Mr. McFarland's *pro se* motion commenced a habeas proceeding. Section 848 creates an unconditional entitlement to counsel for indigent capital habeas petitioners in federal court. Whether Congress intended that entitlement to be available in advance of the filing of the habeas petition, so that counsel could investigate, research, identify, and draft claims in order to assist in the preparation of the petition, is revealed by several provisions of § 848(q) and the context in which it

was adopted. Upon examination of these matters – the express language in § 848(q)(4)(A) permitting counsel to be appointed “at any time” during the post conviction process, § 848(q)(6)'s recognition of the extraordinary need for counsel in capital cases by its requirement that only experienced counsel be appointed to represent capital habeas petitioners, § 848(q)(4)(9)'s authorization of investigative resources in post conviction proceedings for the assistance of appointed counsel, the longstanding rule under the Criminal Justice Act that counsel could be appointed in habeas proceedings in the discretion of the court at any stage of the proceeding,¹² and finally, Congress' clear intent to eliminate the disadvantages of poverty in securing the assistance of counsel in capital federal habeas proceedings – one must conclude that Congress intended to make the services of counsel available in advance of the filing of the petition.

To give effect to this right, the federal courts must have the ability to grant stays of execution when necessary to provide an adequate opportunity for counsel to render the assistance envisioned by Congress. Otherwise, the entitlement to the assistance of counsel is a hollow and cruel gesture.

For these reasons, the Court should hold that a pleading like the one filed by Mr. McFarland commences

¹² See 18 U.S.C. § 3006A; see also Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts.

a federal habeas proceeding under 28 U.S.C. § 2254, giving the federal courts authority to appoint counsel under 28 U.S.C. § 848(q)(4)(B) and stay executions under 28 U.S.C. § 2251.

For the very same reasons, the Court should hold that there is authority under the All Writs Act, 28 U.S.C. § 1651(a), to appoint counsel and stay an execution in the circumstances presented by Mr. McFarland's case. In authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," the All Writs Act "make[s] explicit the right to exercise powers implied from the creation of such courts." Reviser's Notes, 28 U.S.C.A. § 1651 (West 1981). As the Court recognized in another federal habeas case, the Act is intended to serve as "a 'legislatively approved source of procedural instruments designed to achieve the 'rational ends of law.' " *Harris v. Nelson*, 394 U.S. 286, 299 (1969).

In the context presented by Mr. McFarland's case, the rational ends of the law plainly contemplate meaningful representation of indigent capital federal habeas petitioners in connection with federal habeas proceedings. These ends require the appointment of counsel in advance of the filing of the petition and, in cases like McFarland's, a stay of execution. Whether jurisdiction lies under the All Writs Act, (a) because Mr. McFarland's *pro se* motion commenced a proceeding under 21 U.S.C. § 848(q), which needs an All Writs Act stay of execution in order to preserve the court's jurisdiction, or (b) because the court's prospective jurisdiction under the habeas corpus statute needs to be preserved by an All Writs Act stay, the All Writs Act provides authority for

appointing counsel and staying Mr. McFarland's execution.

On this basis as well, the Anti-Injunction Act, 28 U.S.C. § 2283, facilitates, rather than prohibits, the exercise of federal judicial power sought by Mr. McFarland. The equitable underpinnings of § 2283 permit the stay of the state court judgment to be entered here for one of three reasons: (1) it is expressly authorized by 28 U.S.C. § 2251 and that statute applies because the habeas proceeding was commenced by McFarland's *pro se* motion; (2) it is sufficiently authorized by § 848(q), in order to effectuate its provisions, to have been "expressly authorized" by Congress; and (3) it is authorized under the All Writs Act, and stays properly entered pursuant to that act are permitted under § 2283.

ARGUMENT

I. THE PAPERS FILED BY MR. MCFARLAND IN THE DISTRICT COURT MARKED THE BEGINNING OF HIS HABEAS CORPUS PROCEEDING, TRIGGERED HIS RIGHT TO COUNSEL AND GAVE THE DISTRICT COURT JURISDICTION TO STAY HIS EXECUTION.

Frank McFarland – indigent, incarcerated, sentenced to death and without a lawyer – was unable to investigate, prepare, and file a habeas petition in federal district court that raised and properly pled all of the available and potentially meritorious constitutional claims for relief in his case. Accordingly, under threat of imminent execution, he filed a *pro se* pleading in which he informed

the district court that he "want[ed] to challenge [his] conviction and sentence under 28 U.S.C. § 2254," JA 42, and asked the district judge to appoint counsel who could prepare and file a proper habeas petition. Mr. McFarland relied on the automatic right to counsel for indigent capital habeas petitioners created by 21 U.S.C. § 848(q)(4)(B). He also asked the court to stay his execution long enough for counsel to do the investigation and research necessary to prepare a proper petition.¹³ Mr. McFarland had made similar requests in the state courts, which denied them.

The district court and the Fifth Circuit held there was no jurisdiction to issue a stay for the purpose of giving counsel time to do her job, because no habeas proceeding was pending. In their view, Mr. McFarland's pleading did not commence such a proceeding, because he had not filed a habeas corpus petition.

The conclusions reached by the district court and Fifth Circuit are untenable. To hold that there was no jurisdiction to appoint counsel and stay Mr. McFarland's execution because he had not filed a proper and adequate habeas petition would totally defeat the evident legislative purpose underlying both 21 U.S.C. § 848(q)(4)(B) and 28 U.S.C. § 2251.

¹³ The appointment of counsel under 21 U.S.C. § 848(q)(4)(B) is mandatory, upon request and a showing of indigency, "[i]n any post-conviction proceeding under [28 U.S.C.] Section 2254 . . . ," and a stay of execution under 28 U.S.C. § 2251 may be entered when "a habeas corpus proceeding is pending. . . ."

A. Section 848(q)(4)(B) Guarantees A Right To Counsel In Federal Habeas Proceedings For Death-Sentenced Prisoners That Attaches Before A Petitioner Files A Formal Application For Relief.

Enacted in 1988, § 848(q)(4)(B) provides:

In any post conviction proceeding under Section 2254 or Section 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).*

21 U.S.C. § 848(q)(4)(B) (emphasis added). By its terms, this statute creates a mandatory entitlement to the assistance of counsel in federal habeas proceedings for indigent state and federal prisoners sentenced to die. *See Murray v. Giarratano*, 492 U.S. 1, 20 & n.7 (1989) (Stevens, J., dissenting on other grounds, joined by Brennan, Marshall & Blackmun, JJ.) (21 U.S.C. § 848(q)(4)(B) *requires* appointment of counsel in capital habeas cases).¹⁴

¹⁴ Subsequent efforts in Congress to amend § 848 to make the appointment of counsel discretionary have consistently failed. *See, e.g.*, 139 CONG. RECORD (Senate) S2316, S2321 (March 3, 1993); *id.*, S842, S846 (Jan. 5, 1993); 137 CONG. RECORD (Senate) S3192, S3220 (Feb. 6, 1991); *id.*, S1069, S1073 (Jan. 3, 1991); 136 CONG. RECORD S9238, S9240 (Senate) (June 11, 1990); S 135 CONG. RECORD (Senate) S7288, S7293 (Jan. 3, 1989). Each of the proposed bills provided:

In a proceeding under section 2254 of Title 28, United States Code, relating to a state capital case, or any

Prior to the enactment of § 848, any federal habeas petitioner could seek the appointment of counsel, for a specific purpose, in connection with discovery procedures and evidentiary hearings, *see* Rules 6(a) and 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts, or more generally, "at any stage of the case," *see* Rule 8(c), pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B). However, appointment of counsel under these provisions was discretionary, with the court free to determine whether "the interests of justice so require[d]," 18 U.S.C. § 3006A(a)(2)(B) and Rule 8(c), or whether appointment was "necessary for effective utilization of discovery procedures," Rule 6(a). By enacting the mandatory right to counsel in 21 U.S.C. § 848(q)(4)(B), Congress made a legislative determination that "the interests of justice" required the assistance of counsel in all capital habeas proceedings.

The precise question in this case is whether Congress intended the right to counsel to be available to death-sentenced prisoners *prior* to the filing of a proper habeas corpus petition. The analysis of this issue is to be undertaken in light of the rule that remedial statutes, such as § 848(q), must be liberally construed to effectuate their

subsequent proceeding on review, appointment for a petitioner who is or becomes financially unable to afford counsel *shall be in the discretion of the court. . . .*" (emphasis added).

These subsequent unsuccessful attempts to amend § 848(q)(4)(B) are relevant to this Court's interpretation of the statute. *Cf. Wright v. West*, 112 S. Ct. 2482, 2498 (1992) (O'Connor, J., concurring, joined by Blackmun & Stevens, JJ.) (discussing failed attempts to amend federal habeas statute).

remedial purposes. *See, e.g., Atchison, T. & S.F. R. Co. v. Buell*, 480 U.S. 557, 562 (1987); *S.E.C. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943).

A close examination of § 848(q) and the context in which Congress enacted it reveals that Congress intended that condemned prisoners have access to counsel at every time relevant to the pursuit of habeas corpus relief in federal court – including the critical time preceding the filing of the habeas petition, when investigation, research, consultation with experts, identification of claims, and drafting the petition must be accomplished.

Three other provisions in § 848(q) compel this conclusion. Section 848(q)(4)(A) sets forth the statute's general provision for the appointment of counsel in death penalty cases:

Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *at any time* either –

- (i) before judgment; or
- (ii) *after the entry of judgment imposing a sentence of death but before the execution of that judgment;*

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

Id. (emphasis added). This provision makes the right to counsel available "at any time" a condemned person is or

becomes indigent "before the execution of [the death sentence]." Read together with § 848(q)(4)(B), which establishes the right to counsel "[i]n any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence," these provisions reflect an intent to make counsel universally available in all federal proceedings concerned with capital cases, not to deny counsel until a habeas petition has been filed.

Additional provisions of § 848(q) reflect this same intent. Section 848(q)(6) requires that counsel appointed "after judgment" – including both appellate and habeas counsel – meet certain years-of-relevant-experience qualifications. There are no similar qualification requirements for appointment of counsel in non-capital cases under 18 U.S.C. § 3006A. This requirement reflects the settled view that capital cases are more complex than non-capital cases, and thus require representation by more experienced lawyers. *See, e.g., Giarratano*, 492 U.S. at 28 & n.22 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) ("this Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master," and "[i]n apparent recognition of this fact, Congress has required that when a court appoints counsel in capital post conviction proceedings [under 21 U.S.C. § 848(q)(4)(B) and (q)(6)], [certain years-of-relevant-experience criteria must be met]").

In light of Congress' determinations that capital habeas petitioners must be provided specially qualified counsel, it is apparent that Congress intended that the assistance of counsel be afforded at every stage of a habeas proceeding in which the expertise of such counsel is particularly important. No one can seriously dispute

that the stage prior to the filing of the habeas petition is an essential one in the post conviction process, for it is there that counsel's expertise in investigating, researching, identifying, and properly drafting factually-supported claims that are potentially meritorious is not only valuable, but irreplaceable.

Capital cases are legally and factually complex because of the still-evolving Eighth Amendment principles that govern the sentencing proceeding and the need to investigate and litigate aggravating and mitigating circumstances. In addition, doctrines of waiver and forfeiture – procedural default, abuse of the writ, and the failure to adduce available facts in support of a claim when given the opportunity to do so – are not only complex but deadly if they are not carefully understood and observed at every stage of a capital case. *Cf. Coleman v. Thompson*, ___ U.S. ___, 112 S.Ct. 1845 (1992). These doctrines dictate both that counsel undertake meticulous, exhaustive investigation of the factual and legal bases of potential claims so that no meritorious claim is waived, and that she understand the rules governing their application so that potentially waived claims may be salvaged. *See McCleskey v. Zant*, 499 U.S. 467, 489-490 (1991) (tracing the parallel evolution of procedural default and abuse of the writ doctrines). Finally, since Rule 2(c) of the Rules Governing Section 2254 Cases requires fact pleading, not simply notice pleading, in the habeas petition,¹⁵ counsel with expertise in the framing and drafting of habeas

¹⁵ Rule 2(c) requires that the petition set forth "in summary form the facts supporting each of the grounds. . . ."

claims provides a critical safeguard against the unsuccessful pursuit of a claim due to inartful pleading.¹⁶ The complexity of the law, the enormity of the fact-development tasks, and the need for careful drafting thus make it perilous for an unrepresented capital petitioner to prepare a federal habeas petition.¹⁷ In view of Congress' judgment of the need for experienced counsel to represent death-sentenced petitioners, it would be inconsistent with the statute to hold that Congress did not intend to give them the assistance of counsel *prior* to the filing of the federal habeas petition, a time when counsel's expertise is so vital.

The final provision of § 848(q) that leads to this same conclusion is § 848(q)(9), which provides funds for "investigative, expert, or other services [that] are reasonably necessary for the representation" of the petitioner. Pursuant to this provision, "the court shall authorize the [petitioner's] attorneys to obtain such services on [behalf of the petitioner] and shall order the payment of fees and expenses therefor. . . ."

¹⁶ This requirement is not always easily met, even by attorneys. See *Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (affirming the denial of habeas petition raising claim of ineffective assistance of counsel, because "[p]etitioner did not allege in his habeas petition" facts sufficient to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1983)).

¹⁷ Justice Kennedy came to this conclusion in his concurrence, joined by Justice O'Connor, in *Giarratano*, 492 U.S. at 14: "The complexity of our jurisprudence in this area makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Accord id.* at 27-28 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).

The stage of a habeas proceeding in which an investigator or expert is most needed is before the petition is filed. If non-record-based claims are identified, they can only be developed through investigation, with the assistance of investigators, social workers, mitigation experts, psychologists and psychiatrists, firearms and ballistics experts, pathologists, serologists, trace evidence experts, and others who can identify, probe, and draw conclusions regarding relevant facts through their expertise. To be sure, investigation and fact development does not end with the filing of a petition; but much of it must be completed before then. The district court's power to preliminarily examine and summarily dismiss a petition, *see* Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts, and the state's ability to test the factual allegations by motion for summary judgment, assure that petitions are not filed without considerable investigation. Plainly, § 848(q) contemplates that counsel will already have been appointed by the time the need for investigators and experts arises: the statutory mechanism for providing funds for investigative and expert services calls for the petitioner's attorneys to obtain them from the court. The model that members of Congress had in mind when they enacted § 848(q) thus reasonably included the assistance of counsel in advance of the filing of the petition.

That Congress intended to make counsel available to indigent capital federal habeas petitioners before any petition is filed is supported by at least two additional statutory features. The discretionary appointment of counsel under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), for a person "seeking relief under

[§ 2254 of Title 28],” has long been understood to allow the appointment of counsel “at any stage of the case if the interest of justice so requires.” Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts (referring to the authority of the district court to appoint counsel under § 3006A at stages of the habeas proceeding other than an evidentiary hearing) (emphasis added). When Congress decided that fairness required the appointment of counsel in every capital habeas case, it must be assumed that Congress acted with the Criminal Justice Act in mind – and that it intended to provide more protection, not less, to capital habeas petitioners.

Finally, when Congress enacted § 848, it was legislating in a context which recognized that “death is different,” and that this difference calls for greater safeguards against unreliability and unfairness. As was stated nearly two decades ago:

[We] have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. [Citations omitted.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion). One of the most troublesome threats to reliability and fairness articulated in the cases is that

invidious discrimination – based on race or class – might infect the administration of the death penalty. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 255-57 (1972) (Douglas, J., concurring) (finding constitutionally intolerable discrimination on the basis of “the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation,” and thereby escape the death penalty); *id.* at 366 (Marshall, J., concurring) (finding that “the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged,” whose “impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape”).

The protections afforded to indigent prisoners under § 848(q) were responsive to these longstanding concerns: they were intended to eliminate, as much as possible, differential outcomes in capital cases on the basis of financial resources. In this light, it is inconceivable that Congress could have intended to deny indigent habeas petitioners access to counsel in the pre-petition stage of a habeas proceeding, when such assistance would be routine for a prisoner who could afford counsel. As we have demonstrated, the assistance of counsel in investigating, researching, identifying, and framing claims for habeas corpus relief is irreplaceable. If a condemned prisoner does not have that assistance, he is at a severe disadvantage. Given the congressional purpose in enacting § 848(q), Congress could not have intended to codify such a disparity.

B. The Papers Filed In the District Court Triggered Mr. McFarland's Right To Counsel Under § 848.

The circumstances presented by this appeal confirm the wisdom of Congress' judgment. As shown below, the assistance of counsel has meaning for Mr. McFarland only if counsel is appointed *prior* to the filing of his federal habeas petition.

Before filing his *pro se* motion asking the federal district court to appoint counsel and stay his execution, Mr. McFarland sought the same relief in the Texas courts. The state courts denied these requests, which left Mr. McFarland unable to pursue state collateral proceedings.

For this same reason, Mr. McFarland was not in a position to make a full challenge to his conviction and sentence when he appeared *pro se* in federal court. The only way Mr. McFarland could avail himself of his right to have the constitutionality of his conviction and sentence reviewed by a federal court was to obtain the assistance of counsel to prepare his federal habeas petition. Unlike in the state courts, however, in federal district court Mr. McFarland had the absolute statutory right to the assistance of counsel.

In these circumstances, Mr. McFarland faced a dilemma. On the one hand, he could file a *pro se* pleading denominated as a "petition" that he would ask the court *not* to treat as his final petition, but merely as the commencement of a federal habeas proceeding. At the same time, he could ask the court to appoint counsel and stay his execution in order to give counsel the opportunity to investigate and research other potential claims and file an

amended petition. While such a "petition" would necessarily be perfunctory, it would at least meet the State's objection that the filing of a petition is necessary to commence a "proceeding" and thus give the court jurisdiction to appoint counsel and stay his execution. After the recent experience in *Gosch v. Collins*, *supra*, however, if Mr. McFarland had pursued this course, he could reasonably have expected that his effort to obtain the assistance of counsel and a stay would fail.¹⁸

On the other hand, if Mr. McFarland did not file a petition raising formal grounds for relief, he risked encountering the argument pressed by the State of Texas in this case – that a district court acquires jurisdiction to stay an execution only when the petitioner files a formal application for habeas relief.

The prospect that the district court would require a formal habeas petition to invoke its jurisdiction, but nonetheless apply *Barefoot v. Estelle*, 463 U.S. 880 (1983), to judge the adequacy of any petition filed,¹⁹ illuminates the fundamental problem that drove the case to this Court: *Mr. McFarland could not secure statutorily mandated counsel and a stay of execution unless and until he prepared a document that he could not prepare without the assistance of*

¹⁸ See discussion of *Gosch*, *supra*, at 6-7.

¹⁹ The Fifth Circuit's formulation of the *Barefoot* standard would have required Mr. McFarland to " 'present a substantial case on the merits . . . and show that the balance of the equities . . . weighs heavily in the favor of granting the stay.' " *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir. 1984), quoting *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982). *Accord Selva v. Lynaugh*, 842 F.2d 89, 91 (5th Cir. 1988).

counsel. He could not escape this fatal paradox unless the district court provided counsel to help him prepare and file an adequate habeas petition in federal court.

For these reasons, the only sensible reading of § 848(q)(4)(B) is that the right to counsel established by that section includes the right to the assistance of counsel in the pre-petition stage of a federal habeas proceeding. Put differently, the Court should make clear that a habeas "proceeding" has been commenced within the meaning of § 848(q)(4)(B) when a pleading has been filed expressing a settled intention to challenge the conviction and/or death sentence under 28 U.S.C. § 2254 and requesting the appointment of counsel to enable the condemned petitioner to mount that challenge.

It is clear from this analysis that the papers Mr. McFarland filed in federal district court commenced his post conviction proceeding and entitled him to the assistance of counsel under § 848(q)(4)(B). And as shown below, it follows inevitably from that conclusion that a reasonable stay of execution was also necessary to satisfy the requirements of § 848(q).

C. The Papers Filed Below Gave The Court Jurisdiction To Stay The Execution.

Mr. McFarland was scheduled to be executed five days after he filed his *pro se* papers. JA 41. No lawyer could have provided adequate representation in five days. Thus, for Mr. McFarland to have the assistance of counsel to which he was entitled, he also had to have a stay of execution.

Just as no jurisdictional barrier prevented the appointment of counsel in the circumstances of Mr. McFarland's case, no jurisdictional barrier precluded a stay of his execution under 28 U.S.C. § 2251, which authorizes a district court to stay an execution during the pendency of any "habeas corpus proceeding."²⁰ In interpreting § 848(q)(4)(B) – which entitles the petitioner to counsel during any "post conviction proceeding" – and § 2251 – which authorizes a district court to enter a stay during any "habeas corpus proceeding" – the object must be to "make sense rather than nonsense" out of the statutory scheme as a whole.²¹ To achieve a sensible accommodation of these two statutes, the Court need only apply a settled rule of statutory interpretation: "[A] legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). This is particularly so when the two provisions share a common purpose. *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973).

²⁰ Section 2251 provides in relevant part:

A justice or judge of the United States before whom a habeas corpus proceeding is pending may . . . stay any state proceeding against a person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

28 U.S.C. § 2251.

²¹ *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991) (courts must construe ambiguous statutory language "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law . . . and thus make sense rather than nonsense out of the corpus juris").

In this case, the statutes only "make sense" if § 2251 authorized a stay at the same moment that § 848 entitled Mr. McFarland to counsel. Manifestly, a state prisoner seeking federal review has only one "proceeding," whether it is described as a proceeding for "post conviction" relief (as in § 848), or for "habeas corpus" relief (as in § 2251). Such a proceeding commences, for jurisdictional purposes, when a prisoner files a pleading that indicates a firm intention to challenge his conviction and/or sentence under the Constitution of the United States and asks the court for counsel and a stay. That filing empowers a federal court to take at least the preliminary action requested. In addition, § 2251 and § 848 share a common design: both are essential tools for conducting a reliable inquiry into the constitutionality of a petitioner's conviction and sentence. Section 2251 allows the court to preserve its jurisdiction over the person and subject matter of the lawsuit while it considers the merits of the case without the threat of imminent execution; § 848 permits the court to resolve a petitioner's potentially meritorious claims based on a careful presentation by qualified counsel. These two provisions work in tandem, rationalizing the process by which the habeas court discharges the duties imposed by the invocation of the habeas remedy by a *pro se* petitioner. Reading § 2251 and § 848 in this fashion is consistent with both the "statutory developments" reflected in 21 U.S.C. § 848(q)(4)(B) and the "complex and evolving body of equitable principles informed and controlled by historical usage . . . and

judicial decisions," *McCleskey v. Zant*, 499 U.S. at 489, which together guide the Court's habeas decisions.²²

In sum, since Mr. McFarland began his "post conviction proceeding" when he asked the district court to stay his execution and appoint counsel, the Court should also conclude that he began his "habeas corpus proceeding" at the same moment, which gave the district court jurisdiction to stay his imminent execution under § 2251.²³ This

²² The Court has frequently admonished the lower courts to administer the writ of habeas corpus "with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969); see also *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). "Thus, [this Court] ha[s] consistently rejected interpretations of the habeas corpus statute[s] that would suffocate the writ in stifling formalisms or hobble its effectiveness with manacles of arcane and scholastic procedural requirements." *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973). Rather, "the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may . . . deal effectively with any and all form of illegal restraint." *Price v. Johnson*, 334 U.S. 266, 283 (1948).

²³ FED. R. CIV. PRO. 3, which states that "[a] civil action is commenced by the filing of a complaint in the court," does not require the filing of a habeas corpus "petition" or "application" in order to commence a "habeas corpus proceeding" within the meaning of 28 U.S.C. § 2251. See *Brown v. Vasquez*, 952 F.2d 1164, 1169 (9th Cir. 1991). Although a habeas corpus case is theoretically a "civil" action, "th[at] label is gross and inexact." *Harris v. Nelson*, 394 U.S. 286, 294-95 (1969). Habeas Corpus Rule 11 thus provides that the Federal Rules of Civil Procedure are inapplicable to the extent that they are "inconsistent" with habeas rules. See also Advisory Notes to Rule 11 (noting that federal procedure rules should not be applied "rigidly" or "inequitabl[y]" in habeas cases). For the reasons stated above, application of FED. R. CIV. PRO. 3 would be inconsistent with

result allows a federal court to "make sense" of the statutory scheme by granting a stay long enough for counsel to do his job. More to the point, it corrects the anomalous and intolerable result created by the Fifth Circuit, which would degrade the Great Writ by permitting the State to execute a *pro se* inmate because he has failed to do the very thing his *pro se* status prevents him from doing – filing a meaningful habeas petition.

II. THE ALL WRITS ACT, 28 U.S.C. § 1651(a), GAVE THE DISTRICT COURT AUTHORITY TO GRANT A STAY AND APPOINT COUNSEL.

The All Writs Act also permitted the district court to stay Mr. McFarland's execution and appoint counsel to represent him.

The All Writs Act, 28 U.S.C. § 1651(a), authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This enactment "make[s] explicit the right to exercise powers implied from the creation of such courts." Reviser's Notes, 28 U.S.C.A. § 1651 (West 1981). The Act thus codifies a federal court's inherent equitable authority to issue stays or other writs necessary to "fill[] the interstices of federal judicial power when those gaps threaten to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau of Correction v. United States Marshals*

longstanding equitable principles governing federal habeas corpus.

Service, 474 U.S. 34, 42 (1985). As the Court recognized in a habeas corpus context, the Act is thus intended to serve as a "legislatively approved source of procedural instruments designed to achieve the rational ends of law." *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (internal quotation and citations omitted). The variety of circumstances in which the Court has both applied and approved the use of the Act illustrates the breadth of its equitable reach.

Of particular significance here, numerous decisions of this Court have interpreted the Act to allow a federal court to grant an injunction "in aid of" that court's *prospective* jurisdiction.²⁴ In the leading case of *FTC v. Dean Foods Co.*, 384 U.S. 597 (1965), *modified on other grounds*, *Sampson v. Murray*, 415 U.S. 61 (1974), the Court held that the All Writs Act authorized a federal circuit court to enjoin a corporate merger to preserve the court's future appellate jurisdiction over a forthcoming decision by the Federal Trade Commission regarding the legality of the merger under the antitrust laws. Such injunctive relief, the Court held, was "in aid [of] the potential jurisdiction

²⁴ See, e.g., *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1965); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943); *McClellan v. Carland*, 217 U.S. 268, 280 (1910); *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992) ("The federal courts' authority under the All Writs Act [is] to be used 'in aid of their prospective jurisdiction.'" (citation omitted); *ITT Community Develop. Corp. v. Barton*, 569 F.2d 1351, 1359 n.19 (5th Cir. 1978) ("A federal court has the power under the All Writs Act to issue injunctive orders in a case even before the court's jurisdiction has been established"). See also *Republican State Central Committee of Arizona v. Ripon Society*, 409 U.S. 1222, 1225 (1972) (Rehnquist, J., in chambers) ("a stay here [under § 1651] preserves issues for review").

of the appellate court where an appeal is not then pending but may later be perfected." *Id.* at 603 (collecting cases).

The Court has similarly held that the All Writs Act permits a federal appellate court to preserve its prospective habeas corpus jurisdiction in a capital case by staying an imminent execution. See *Woodward v. Hutchins*, 464 U.S. 377 (1984) (per curiam). In *Woodward*, a capital habeas petitioner filed a habeas corpus petition and a motion for stay of execution in federal district court on the eve of a scheduled execution. The district court denied a stay but refused to rule on the petition. That refusal prevented the petitioner from pursuing an appeal, thus requiring some alternative basis for the appellate court's exercise of power to preserve the status quo pending its anticipated appellate jurisdiction over the district court's order. The petitioner filed an original application for stay with a single judge of the Fourth Circuit, who granted the request. See *id.* at 381-82 (Brennan, J., dissenting). On appeal, the Court held that the circuit judge had jurisdiction to enter the stay under the All Writs Act, even though no other statutory provision gave the circuit judge present jurisdiction to enter a stay. *Woodward*, 464 U.S. at 377; *id.* at 382 (Brennan, J., dissenting). See also *Lenhard v. Wolff*, 443 U.S. 1306 (1979) (Rehnquist, J., in chambers) (citing 28 U.S.C. § 1651(a) as authority to grant a stay in federal habeas death penalty case).²⁵

²⁵ Similarly, in *Land v. Florida*, 377 U.S. 959 (1964), the Court denied a *pro se* capital defendant's petition for writ of certiorari filed on direct appeal, but stayed his execution for sixty days from the date of the denial "to allow the petitioner to file a

These cases demonstrate that a district court, acting under the All Writs Act, has authority to afford the relief sought by Mr. McFarland's *pro se* motions. Even if § 848 and § 2251 were unavailable prior to the filing of a petition, the district court nonetheless could stay Mr. McFarland's execution and appoint counsel to preserve its undisputed *prospective* jurisdiction under the entire federal habeas corpus statutory scheme, including 21 U.S.C. § 848(q)(4)(B). That is, since the protections afforded by the habeas statutes – including the right to counsel – cannot be given effect without some limited window of time in which counsel can be appointed and prepare a habeas petition, the district court can only "achieve the rational ends of the law" by staying the imminent execution. *Harris v. Nelson*, 394 U.S. at 299. A stay under the All Writs Act thus serves as a temporal bridge, spanning the point at which a *pro se* prisoner can indicate his intention to invoke the court's jurisdiction and the point when counsel can file a meaningful habeas petition.²⁶ See *Brown v. Vasquez*, 743 F. Supp. 729 (C.D.

petition for a writ of habeas corpus." The Court also held, that should Land file a petition, the stay would remain in effect pending its disposition. *Id.* at 959. Authority for this stay could come only from the All Writs Act, since no other provision would have provided the Court with jurisdiction to enter a stay once it had denied the petition for certiorari.

²⁶ Since the stay would be entered only to bridge the gap until Mr. McFarland could file a formal application for relief, it need not extend past the point at which such an application is filed. Indeed, once a formal application is filed, the district court may conclude it presents no colorable claims for relief, and dissolve the stay. In addition, the bridge urged by Mr. McFarland would not extend for an indefinite duration, since the

Cal. 1990), *aff'd on other grounds*, 952 F.2d 1164 (9th Cir. 1991) (federal district court has jurisdiction under All Writs Act to stay scheduled execution of *pro se* death row inmate to protect prospective jurisdiction under federal habeas statutes). The All Writs Act thus "fills the interstice[] of federal judicial power," *Pennsylvania Bureau of Correction*, 474 U.S. at 42, and allows the district court to prevent the execution of a *pro se* indigent death row inmate simply because he is temporarily unable to prepare and file the document that would indisputably vest the district court with present, as opposed to prospective, jurisdiction.

The All Writs Act also makes plain that the district court has authority to appoint counsel to help Mr. McFarland prepare a formal application for relief. Justice Frankfurter, writing for the Court in *Brown v. Allen*, recognized that "a lawyer may be appointed, in the exercise of the inherent authority of the District Court, . . . as counsel for the [habeas] petitioner. . . ." 344 U.S. 443, 502 (1954). Justice Frankfurter's discussion of a federal court's "inherent" authority to appoint counsel in federal habeas is instructive in the present context because, as noted, the All Writs Act "make[s] explicit the right to exercise powers implied from the creation of such courts." Reviser's Notes, 28 U.S.C.A. § 1651 (West 1981) (emphasis added).

district court could impose a deadline by which appointed counsel must either file a formal application, or advise the court based on a review of the record and an adequate investigation that the petitioner cannot state a colorable claim for relief. This result would not alter the Court's holding in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and would not prevent the expeditious resolution of such cases.

That is, the All Writs Act declares the *inherent* authority of a federal court to issue those writs necessary to its prospective jurisdiction.

As discussed in Point I, *supra*, the assistance of counsel is necessary to effectuate the procedural and substantive rights guaranteed to a state death row inmate in a federal habeas corpus proceeding. Indeed, because the Fifth Circuit in *Gosch* effectively instructed the federal district courts in Texas to judge the sufficiency of any petition, even a *pro se* petition filed solely to resolve the district court's jurisdiction to stay an execution, under the standard established in *Barefoot*, the assistance of counsel to help prepare such a petition is the *sine qua non* of any further proceedings.

Mr. McFarland's case, in this respect, resembles *Harris v. Nelson*. In *Harris*, the Court held that the All Writs Act gave the district court authority to order discovery in federal habeas corpus as part of "the inescapable obligation of the courts," even though the Federal Rules of Civil Procedure at that time did not apply to federal habeas corpus proceedings. 394 U.S. at 298-99. While the significance of full discovery cannot be denied, it pales in comparison to the singular importance of the assistance of counsel to effectuate any post conviction remedy. Accordingly, because district courts have the inherent authority to appoint counsel to prepare a habeas corpus petition, and because counsel was necessary in this case to give effect to the Great Writ, the All Writs Act provided the district court with authority to appoint counsel to prepare the document that would subsequently confirm the court's present jurisdiction.

III.

THE ANTI-INJUNCTION ACT, 28 U.S.C. § 2283, DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION OR AUTHORITY TO STAY MR. McFARLAND'S EXECUTION.

A. As a Non-Jurisdictional Statutory Reflection of Federalism, the Anti-Injunction Act Should Not Be Mechanically Applied to Defeat Federal Interests When the Balance of Equities Weighs in Their Favor.

Originally enacted in 1789, the Anti-Injunction Act currently provides that, subject to important exceptions, a federal court "may not grant an injunction to stay proceedings in a State court. . . ." 28 U.S.C. § 2283. In the first century and a half after the statute was enacted, federal courts grafted a number of exceptions onto the general rule.²⁷ This history led the Court later to observe, in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), that the Anti-Injunction Act and its exceptions were merely an expression of the well-established rule of comity between state and federal courts:

The provision has been in force more than a century and has often been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in

²⁷ See *Mitchum v. Foster*, 407 U.S. 225, 233-34 (1972); *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 134-39 (1941).

their discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated.

Id. at 183 (emphasis added).

In 1941, the Court reinterpreted the statute as an essentially unqualified proscription, permitting no exceptions. *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 132 (1941). Congress responded in 1948 by amending the Act so as to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision." Reviser's Note, 28 U.S.C.A. § 2283 (West 1981); see also H.R. Rep. No. 308, 80th Cong., 1st Sess., A181-82 (1947); *Mitchum v. Foster*, 407 U.S. 225, 236-37 nn.21-22 (1972) (discussing legislative history of 1948 amendment); 16 Wright, Miller & Cooper, *FEDERAL PRACTICE & PROCEDURE* § 4221 at 499-500 (1978 & 1987).

To achieve this end, Congress created three statutory exceptions to the Anti-Injunction Act that remain in force today. The exceptions permit federal stays of state court proceedings: (i) when another congressional statute authorizes such a stay; (ii) when a stay is necessary "in aid of" a federal court's jurisdiction; and (iii) when a stay is necessary "to protect or effectuate [federal] judgments." See *Younger v. Harris*, 401 U.S. 37, 43 (1971).

In light of the 1948 amendment and the anti-injunction jurisprudence prior to *Toucey*, the Anti-Injunction Act should not be read as a jurisdictional bar to federal injunctions of state court proceedings,²⁸ but instead as a

²⁸ See *Smith v. Apple*, 264 U.S. 274, 278-79 (1924); *Gloucester M.R. Corp. v. Charles Parisi, Inc.*, 848 F.2d 12, 15 (1st Cir. 1988);

"limitation upon the general equity powers of the United States Courts." *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 74 (1939); see also *Smith v. Apple*, 264 U.S. at 278-79. There is no occasion for such limitation when the statutory exceptions apply and especially when the execution of a state court judgment would "be contrary to recognized principles of equity and the standards of good conscience." *Wells Fargo*, 254 U.S. at 183-84 (citations omitted); see also *Essanay Film Manufacturing Co. v. Kane*, 258 U.S. 358, 360 (1922).

Another lodestone in interpreting the Anti-Injunction Act is consistency with our system of federalism. While the Act is enforced strictly when a state court's legitimate interests would otherwise be unduly infringed by a federal court injunction, by the same token state court proceedings must give way when weightier federal interests are at stake. See *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226 (1957); cf. *Younger*, 401 U.S. at 44 ("[Federalism] does not mean blind deference to 'State's Rights' [but] a system in which there is sensitivity to the legitimate interests of both State and National Governments").

Permitting Texas to execute Mr. McFarland, a *pro se* indigent death row inmate, before he has had a meaningful opportunity, with the assistance of counsel, to pursue

Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1225 (8th Cir. 1987); *Re: Moody Aircraft, Inc.*, 730 F.2d 367, 374 (5th Cir. 1984); *Baines v. City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964); see also 17 Wright, Miller & Cooper, *FEDERAL PRACTICE & PROCEDURE*, § 4222, at 514 (1978 & 1987) (collecting "cases that have said that the Anti-Injunction Act is not jurisdictional"); 1A Moore's *Federal Practice* § 0.208, at 2313-14.

his statutory right to collateral review of his conviction and death sentence is inconsistent with our federalism. While state court judgments in criminal cases are entitled to respect in our federal system, the federal habeas statutes interpose a superior federal interest of having such state court judgments reviewed for harmful constitutional error in a federal court. Because Congress never intended that the federal courts would stand by while the state executes an indigent prisoner under these circumstances, the federal interest at stake in this case must prevail.

B. Mr. McFarland's Case Falls Within The First Statutory Exception To The Anti-Injunction Act, Since A Stay Is Necessary To Enforce A Uniquely Federal Right.

The first statutory exception to the Act allows a federal court to stay a state court proceeding if an Act of Congress has authorized a stay in another statute. See 28 U.S.C. § 2283. In *Mitchum v. Foster*, 407 U.S. 225 (1972), this Court held that the first exception to the Anti-Injunction Act must be interpreted to give full effect to an intended federal right:

[I]t is clear that, in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. The test [is] whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be

given its intended scope only by the stay of a state court proceeding.

Id. at 237-38 (emphasis added).

28 U.S.C. § 2251 expressly provides that federal courts "may . . . stay any proceeding . . . in any State court or by or under [state] . . . authority" during the pendency of § 2254 proceedings. This is a specific congressional grant of authority to stay state proceedings. See Wright, Miller & Cooper, 17 FEDERAL PRACTICE & PROCEDURE, § 4224, 521-22 (1978 & 1987). As discussed above, § 2251 provided the lower courts with jurisdiction to stay Mr. McFarland's execution, and a stay under that provision does not violate the Anti-Injunction Act.

Even if § 2251 were not available, § 848(q)(4)(B) would be enough to invoke the first exception to the Anti-Injunction Act. As demonstrated in Point I, *supra*, § 848(q)(4)(B) requires a federal district court to appoint counsel for an indigent *pro se* death row inmate to enable the inmate to prepare and pursue a habeas corpus petition. With § 848(q)(4)(B), therefore, Congress has "created a specific and uniquely federal right or remedy" that not only "could be frustrated," but would be utterly defeated "if the federal court[s] were not empowered to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. at 237-38.

Thus, under the first exception to the Anti-Injunction Act, the district court was empowered to stay Mr. McFarland's execution to assure that his federal habeas case would be heard and to protect his right to counsel.²⁹

C. Mr. McFarland's Case Also Falls Within The Second Exception To The Act, Because A Stay of Execution Is "In Aid Of" The Court's Prospective Jurisdiction Under The Federal Habeas Corpus Statute.

A stay of execution in this case also falls within the second exception to the Anti-Injunction Act, which allows a federal court, "in aid of its jurisdiction," to stay state proceedings. 28 U.S.C. § 2283. The similarity between this contention and the analysis of the All Writs Act in Section II, *supra*, is no coincidence. Congress intended the second exception of the Anti-Injunction Act to incorporate the

²⁹ As discussed above, the All Writs Act, 28 U.S.C. § 1651(a), provided the district court with jurisdiction to enter a stay of Mr. McFarland's scheduled execution in order to preserve the federal court's prospective jurisdiction under the federal habeas statutory scheme. While the plain language of the All Writs Act falls squarely within the second exception to the Anti-Injunction Act, *see infra*, the All Writs Act is also an Act of Congress that expressly authorizes a stay of state court proceedings within the meaning of the first exception to the Act. "Whether viewed as an affirmative grant of power to the [federal] courts or as an exception to the Anti-Injunction Act, the All Writs Act permits courts to . . . stay pending . . . state cases" where appropriate. *In re Joint Eastern & Southern District Asbestos Litigation*, 134 F.R.D. 32, 37 (E.& S.D.N.Y. 1990) (Weinstein, J.). Because the district court also had jurisdiction under the All Writs Act, a stay of execution fell within the first exception to the Act.

All Writs Act. As the Reviser's Note to the 1948 amendment to the Anti-Injunction Act explains, "[t]he phrase 'in aid of jurisdiction' was added to conform to section 1651 of this title. . . ." Reviser's Note, 28 U.S.C.A. § 2283 (West 1981).³⁰ Accordingly, the two statutes must be read in conjunction.³¹

Even if the legislative history were not considered dispositive, under well-established principles of statutory construction, this Court must treat the second exception to the Anti-Injunction Act and the All Writs Act as *in pari materia*. Both statutes govern equitable injunctive relief granted by federal courts and are closely related provisions in Title 28 of the United States Code; they use virtually the same language and both were passed by Congress in 1948. As the Court has explained,

The rule of *in pari materia* – like any canon of statutory construction – is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. . . . [T]he rule's application certainly makes

³⁰ See also William T. Mayton, *Erstaz Federalism Under the Anti-Injunction Statute*, 72 COLUM. L. REV. 330, 363 (1978) ("[T]he legislative history also states that the [second] exception was added 'to conform' to the all writs statute, thereby indicating an authority to issue writs in aid of jurisdiction consistent with the broad authority conferred by that statute.") (emphasis added).

³¹ See *Kline v. Burke Construction Co.*, 260 U.S. 226, 228-29 (1922); *General Railway Signal Co. v. Corcoran*, 921 F.2d 700, 707 (7th Cir. 1991); *In re Baldwin-United Corporation*, 770 F.2d 328, 335 (2d Cir. 1985); *Jennings v. Boenning & Co.*, 482 F.2d 1128, 1135 n.5 (3d Cir. 1973); see also 1A Moore's Federal Practice, § 0.208, at 2313; 19 Fed. Proc. L. Ed. § 47:97, at 506.

the most sense when the statutes were enacted by the same legislative body at the same time.

Erlenbaugh v. United States, 409 U.S. 239, 243-44 (1972).
Accord Northcross v. Board of Education, 412 U.S. 427, 428 (1973); *United States v. Stewart*, 311 U.S. 60, 64 (1940).

Accordingly, because the All Writs Act and the second exception to the Anti-Injunction Act are *in pari materia*, the application of the All Writs Act to a federal court's prospective jurisdiction applies equally to the construction given to the second exception to the Anti-Injunction Act. And because, as demonstrated above, the district court had jurisdiction under the All Writs Act to stay the execution, the stay itself falls within the second exception to the Anti-Injunction Act.

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Fifth Circuit must be reversed and the case remanded for the appointment of counsel to represent Mr. McFarland in his § 2254 proceeding.

Respectfully submitted,

* MANDY WELCH
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
fax (713) 522-2733

DOUGLAS G. ROBINSON
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7800
fax (202) 393-5760

* Counsel of record

93-6497

No. 93-1954

(9)

Supreme Court, U.S.

FILED

FEB 14 1994

OFFICE OF THE CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,
Petitioner,

v.

*JAMES A. COLLINS, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,*
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF

DAN MORALES
Attorney General of Texas

***MARGARET PORTMAN GRIFFEY**
Assistant Attorney General
Chief, Capital Litigation Division

JORGE VEGA
First Assistant Attorney General

STEPHANI A. STELMACH
Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General for
Criminal Justice

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* Counsel of Record

BEST AVAILABLE COPY

104 RP

QUESTION PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651 (a), in order to appoint counsel for an indigent *pro se* death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. The authority of a federal court to stay an execution scheduled by a state is derived solely from the express provisions of 28 U.S.C. § 2251, which require that a habeas corpus proceeding be pending before the court.	7
A. <i>Anti-injunction Act</i>	7
B. <i>Habeas Corpus Act</i>	10
C. <i>Anti-Drug Abuse Act of 1988</i> ...	16
1. Implied authority to enter a stay may not be derived from § 848(q) where express provisions exist in § 2251. ...	16

2. Section 848(q) does not constitute an express exception to the Anti-Injunction Act.	18
D. All Writs Act	22
II. Enjoining a state execution when no constitutional infirmity in the conviction and sentence has been identified is contrary to long standing concerns of federalism and comity.	28
III. The so-called "crisis in representation" of death-sentenced inmates in Texas results from a deliberate manipulation of existing process.	30
A. <i>Procedures for securing counsel to assist death-sentenced inmates in state habeas review.</i>	31
1. McFarland's case	32
2. Attempts to reform procedure in state habeas review of capital cases to provide for the appointment of counsel..	34
B. <i>Procedures for securing counsel to assist death-sentenced inmates in federal habeas review.</i>	35

IV. The authorization of federal courts to stay state executions in order to appoint counsel must not eviscerate the exhaustion requirement or deprive the states of procedural defaults.	36
CONCLUSION	37

TABLE OF AUTHORITIES

Cases	Page
<i>Abney v. United States</i> , 431 U.S. 651 (1977)	19
<i>Adams v. United States ex. rel. McCann</i> , 317 U.S. 269 (1942)	24
<i>Amalgamated Clothing Workers v. Richmond Brothers</i> , 348 U.S. 511 (1955)	9, 23, 25
<i>Amoco Production Co. v. Village of Gambell, Alaska</i> , 480 U.S. 531 (1987)	26
<i>Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.</i> , 398 U.S. 281 (1970)	8, 17, 25, 27
<i>Autry v. Estelle</i> , 464 U.S. 1 (1983)	13, 14
<i>Baldwin County Welcome Center v. Brown</i> , 466 U.S. 147 (1984)	12, 13
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	7, 13, 14, 29
<i>Blum v. Stenson</i> , 465 U.S. 886 (1984)	10
<i>Board of Governors v. MCorp Financial</i> , 112 S.Ct. 459 (1991)	17
<i>Brecht v. Abrahamson</i> , 113 S.Ct. 1710 (1993) ..	28, 29
<i>Browder v. Director, Dept. of Corrections of Illinois</i> , 434 U.S. 257 (1977)	12
<i>Caminetti v. United States</i> , 242 U.S. 470 (1917)	10
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	19

<i>Chick Kam Choo v. Exxon Corp.</i> , 486 U.S. 140 (1988)	8
<i>Coleman v. Thompson</i> , 111 S.Ct. 2546 (1991) ..	20
<i>Commonwealth of Massachusetts, In re</i> , 197 U.S. 482 (1905)	12
<i>Covington & Cincinnati Bridge Co. v. Hager</i> , 203 U.S. 109 (1906)	24
<i>Crawford Fitting Company v. J.T. Gibbons, Inc.</i> , 482 U.S. 437 (1987)	17
<i>Davis v. United States</i> , 417 U.S. 333 (1974) ...	19
<i>Demosthenes v. Baal</i> , 110 S.Ct. 2223 (1990) ...	13
<i>Ford Motor Credit Co. v. Cenance</i> , 452 U.S. 155 (1981)	10
<i>FTC v. Dean Foods Co.</i> , 384 U.S. 597 (1966)	24, 26
<i>Gosch v. Collins</i> , No. 93-8635, slip op. (5th Cir. Sept. 16, 1993)	30, 33
<i>Harris v. Nelson</i> , 394 U.S. 286 (1969)	23
<i>In re Commonwealth of Massachusetts</i> , 197 U.S. 482 (1905)	24
<i>Iselin v. United States</i> , 270 U.S. 245 (1926)	17
<i>Land v. Florida</i> , 377 U.S. 959 (1964)	27
<i>Lenhard v. Wolff</i> , 443 U.S. 1306 (1979)	26, 27
<i>Lockhart, Ex parte</i> , ___ S.W.2d ___, No. 25-669-01, slip op. (Tex. Crim. App. Nov. 22, 1993)..	31
<i>Maine v. Thiboutot</i> , 448 U.S. 1 (1980)	10

<i>McCane v. Durston</i> , 153 U.S. 684 (1894)	19
<i>McCleskey v. Zant</i> , 111 S.Ct. 1454 (1991)	20
<i>McFarland v. Collins</i> , 8 F3d. 256 (1993)	33, 34
<i>Mitchum v. Foster</i> , 407 U.S. 231 (1972)	<i>passim</i>
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	17
<i>Murray v. Giarrantano</i> , 492 U.S. 1 (1989)	20
<i>Pennsylvania Bureau of Correction</i> <i>v. United States Marshals</i> , 474 U.S. 34 (1985)	20, 22, 27
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987)	20
<i>Porter v. Warner Holding Co.</i> , 328 U.S. 395 (1946)	26
<i>Price v. Johnston</i> , 334 U.S. 266 (1948)	23, 24
<i>Sampson v. Murray</i> , 415 U.S. 61 (1974)	25, 26
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982)	14, 19, 25
<i>Sunal v. Large</i> , 368 U.S. 424 (1962)	19
<i>Stern v. South Chester Tube Co.</i> , 390 U.S. 606 (1968)	24
<i>Stone v. Powell</i> , 428 U.S. 465 (1976)	19
<i>Swain v. Presley</i> , 430 U.S. 372 (1977)	19
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	37
<i>Townsend v. Sain</i> , 372 U.S. 293 (1963)	14, 19
<i>United States v. MacCollom</i> , 426 U.S. 317 (1976)	19

<i>United States v. New York Telephone Co.</i> , 434 U.S. 159 (1977)	23, 24
<i>United States v. Ron Pair Enterprises, Inc.</i> , 489 U.S. 235 (1989)	10
<i>United States v. Turkette</i> , 452 U.S. 576 (1981) ..	10
<i>Vendo Co. v. Lektro-Vend Corp.</i> , 433 U.S. 623 (1977)	8, 9, 20, 21
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977)	20, 28
<i>West Virginia University Hospitals v. Casey</i> , 111 S.Ct. 1138 (1991)	10, 17
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990)	13, 25
<i>Woodard v. Hutchins</i> , 464 U.S. 377 (1984)	26
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	7, 8
Constitutions, Statutes and Rules	
U. S. Const., Art. I, § 9	19
18 U.S.C. § 3006A(a)	27
21 U.S.C. § 848(q)(4)(B)	<i>passim</i>
28 U.S.C. § 1254	2
28 U.S.C. § 1651(a)	<i>passim</i>
28 U.S.C. § 2241(d)	11
28 U.S.C. § 2242	11, 12
28 U.S.C. § 2251	<i>passim</i>
28 U.S.C. § 2254	<i>passim</i>

28 U.S.C. § 2283	<i>passim</i>
42 U.S.C. § 1983	8, 18
TEX. CODE CRIM. PROC. art. 1.051	31
TEX. CODE CRIM. PROC. art. 37.071(b)	2
TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991)	2
FED. R. CIV. P. 3	12
FED. R. CIV. P. 81(a)(2)	12
Rule 2, 28 U.S.C. fol. § 2254	11, 12
Rule 3, 28 U.S.C. fol. § 2254	12
Rule 11, 28 U.S.C. fol. § 2254	12
TEX. R. APP. P. 233	31
Congressional Record and Reports	
H.R. Rep. No. 23, 60th Congress, 1st Session 1-2 (1908)	15
32 Cong. Rec. 608-9 (Jan. 11, 1908)	15
78 Cong. Rec. 12,366 (June 18, 1934)	16
Miscellaneous	
C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 4263 (1988 ed.)	14, 19
Friendly, <i>Is Innocence Irrelevant?</i> <i>Collateral Attack on Criminal Judgments</i> , 38 U. CHI. L. REV. 142 (1970)	19

<i>Oaks, Legal History in the High-Court-Habeas Corpus,</i> 64 MICH. L. REV. 451 (1966)	19
<i>Teel, Federal Habeas Corpus,</i> <i>Relevance of the Guilt Determination</i> <i>Process to Restriction on the Great Writ,</i> 37-1 SW.L.J. 519 (1983)	20

No. 93-1954

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE UNITED
STATES SUPREME COURT:

NOW COMES, James A. Collins, Director, Texas
Department of Criminal Justice, Institutional Division,
Respondent herein ("the Director"), by and through the Attorney
General of Texas, and files this Brief.

OPINION BELOW

The opinion of the United States Court of Appeals for
the Fifth Circuit was delivered on October 26, 1993, and is

published as *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993). JA 81.¹

JURISDICTION

McFarland attempts to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

McFarland bases his claim on 28 U.S.C. § 2251, 28 U.S.C. § 1651(a), 28 U.S.C. § 2283, and 21 U.S.C. § 848 (q) (4) (B).

STATEMENT OF THE CASE

The Director has lawful custody of McFarland pursuant to a judgment and sentence of Criminal Court Number 3, Tarrant County, Texas. McFarland was indicted on March 23, 1988 in Cause Number 0336837D for the capital murder of Terry Hokanson in the course of committing aggravated sexual assault. See TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991). McFarland entered a plea of "not guilty" to the indictment. Trial on the merits commenced on October 26, 1989, and on November 13, 1989, the jury returned a verdict of guilty as charged in the indictment. Following a separate hearing on punishment, the same jury affirmatively answered two special issues submitted to it pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure. Thereafter, the trial court sentenced McFarland to death by lethal injection.

McFarland's case was automatically appealed to the Texas Court of Criminal Appeals, which affirmed his conviction and sentence on September 23, 1992. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). Rehearing was denied on

¹ "JA" refers to the Joint Appendix.

December 9, 1992. The Texas Appellate Practice and Education Resource Center (hereinafter "the Center") withdrew records of McFarland's trial and appeal from the Court of Criminal Appeals on January 19, 1993, and returned them on January 25, 1993. JA 98.

Jack V. Strickland, who represented McFarland on direct appeal to the Court of Criminal Appeals, evinced his intent to continue representing McFarland by filing on December 12, 1992, a motion to stay the mandate in the Court of Criminal Appeals to allow adequate time to file a certiorari petition. See Appendix B to Respondent's Opposition to Application for Stay of Execution in the district court (Strickland's Motion to Stay the Mandate). This apparently was Strickland's last appearance as counsel for McFarland. The motion was granted, and the mandate stayed until March 12, 1993. After receiving correspondence from the Center on March 11th and April 19th, McFarland wrote to Strickland. See Appendix C to Opposition to Application for Stay of Execution in the district court (TDCJ-ID-Outgoing Mail Log). Following that correspondence, Strickland no longer appeared as counsel of record.

On March 9, 1993, Isaiah Gant of Nashville, Tennessee, an attorney recruited by the Center, filed a petition for writ of certiorari, which was denied on June 6, 1993. *McFarland v. Texas*, 113 S.Ct. 2937 (1993). More than two months later, on August 16, 1993, the state trial judge, Judge Leonard, entered an order scheduling McFarland's execution for September 23, 1993. JA 3-5. By letter dated September 19, 1993, Eden Harrington of the Center asked Judge Leonard to withdraw McFarland's scheduled execution date because it would take "at least 120 days" to locate new counsel for McFarland, and recruited or appointed counsel should be allowed at least an additional 120 days to prepare the state habeas application. JA 6-10. The following day, the trial court conducted a hearing attended by Lynn Lamberty of the Center and representatives of the Tarrant County District Attorney's Office. Lamberty asked the Court to withdraw McFarland's execution order to allow the

Center to find new counsel and to allow newly recruited counsel to file a state habeas application "within 120 days after the notice of recruitment of counsel is filed with this Court." JA 11. Judge Drago, sitting for Judge Leonard for purposes of the hearing only, denied the Center's request and ordered the modification of McFarland's execution to October 27, 1993. JA 12.

Judge Leonard received a second letter and proposed order from the Center, dated October 16, 1993. In the letter, the Center stated that it still had not secured counsel for McFarland and again asked the court to withdraw the execution date. JA 16-19. On October 21, 1993, with the assistance of the Center, McFarland filed a *pro se* application for stay of execution and motion for appointment of counsel in the Court of Criminal Appeals. JA 21-23. Neither the stay application nor the motion for appointment of counsel was presented to the trial court. JA 89-90. The Court of Criminal Appeals denied the application for stay and the motion on Friday, October 22, 1993. JA 40.

The same day, with the assistance of the Center, McFarland filed *pro se* a motion for stay of execution and for appointment of counsel in the United States District Court for the Northern District of Texas, Fort Worth Division, docketed as No. 4:93-CV-714-A. JA 41-45. No federal habeas corpus petition was filed. On October 25, 1993, the district court denied a stay of execution because McFarland had not invoked its jurisdiction by filing a federal habeas petition. JA 76-78. On October 26th, the district court struck from the record McFarland's application for a certificate of probable cause to appeal (CPC), because the action did not represent an habeas proceeding. JA 79-80. The United States Court of Appeals for the Fifth Circuit denied CPC and a stay at approximately 6 p.m. the same day. JA 85-88; *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993). The Court then granted McFarland's subsequent application for stay of execution pending disposition of the instant petition for certiorari review. *McFarland v. Collins*, 114 S.Ct. 544 (1994).

At approximately 6 p.m. on October 26th, McFarland filed a motion for appointment of counsel and stay of execution and a federal petition for writ of habeas corpus, No. 4:93-CV-723-A, in which he raised one ground for relief. In an order that addressed the merits of McFarland's claim, the district court denied a stay of execution. McFarland's subsequent motion for leave to file an amended habeas petition did not include any additional grounds for relief and was denied by the district court at approximately 8:30 p.m. CPC was denied by the district court at 10:17 p.m. A motion for stay of execution was thereafter granted by the Fifth Circuit at approximately 11:50 p.m. On October 28th, McFarland filed in the district court a notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a). McFarland's appeal subsequently was dismissed as moot and the stay lifted. *McFarland v. Collins*, 8 F.3d 256 (5th Cir. 1993).

SUMMARY OF ARGUMENT

McFarland's request for a stay of execution did not confer jurisdiction on the federal district court to stay the state execution. The Anti-Injunction Act is an absolute prohibition against the injunction of state court proceedings unless the injunction falls within one of the three specifically defined exceptions in the Act. The exceptions authorize a federal court to grant injunctive relief if expressly authorized by Act of Congress, where necessary in aid of a court's jurisdiction, or to protect or effectuate the court's judgments.

The authority of a federal court to stay an execution scheduled by a state court is derived solely from the express provisions of 28 U.S.C. § 2251, which require that a habeas corpus proceeding be pending before the court. In order for a habeas corpus proceeding to be pending, a petitioner must have filed a petition identifying claims of constitutional dimension and alleging the factual support for such claims. This conclusion is dictated by the plain language of the statute, its legislative history, and the decisions of the Court.

The specific statutory grant of authority in § 2251 to enjoin state court proceedings controls over the provisions of 28 U.S.C. §§ 848 (q) & 1651. Section 848 (q) does not directly authorize injunctive relief and cannot be construed to constitute an express exception to the Anti-Injunction Act under the analysis of *Mitchum v. Foster*, 407 U.S. 225 (1972). The failure to provide counsel pursuant to § 848 (q) does not implicate constitutional concerns that would be cognizable in federal habeas review and, thus, cannot establish a federal right or remedy enforceable against the states by injunctive relief. Further, no legislative history or authoritative evidence supports the inference that, in enacting § 848 (q), Congress necessarily intended that the federal habeas courts would be empowered to stay executions in order to appoint counsel under that provision. The effectiveness of the provisions for appointment of counsel do not depend on a federal habeas court's ability to stay an execution, but rather depend upon a petitioner's timely request for such an appointment.

The All Writs Act, 28 U.S.C. § 1651, does not confer jurisdiction on the federal district court where there exists no case or controversy. The Act is a residual source of authority to issue writs in aid of otherwise existing jurisdiction. Moreover, where, as here, a statute specifically applies, it is that authority and *not* the All Writs Act that is controlling. Further, because a federal district court does not have potential appellate jurisdiction over federal questions raised in state court, the All Writs Act could not have vested the district court with power to enjoin the execution "in aid of" its prospective jurisdiction.

Finally, even if it is assumed, *arguendo*, that the district court had jurisdiction to grant McFarland's requested stay of execution, to enjoin the execution of a presumptively valid state sentence where no constitutional infirmity has been identified would constitute a most egregious violation of the important interests of federalism and comity.

ARGUMENT

- I. **The authority of a federal court to stay an execution scheduled by a state is derived solely from the express provisions of 28 U.S.C. § 2251, which require that a habeas corpus proceeding be pending before the court.**

Before a federal court may enjoin a state court proceeding, it must be shown (1) that the facts fall within one of the expressly authorized exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, (2) that the injunctive relief does not violate interests of federalism and comity, *Mitchum v. Foster*, 407 U.S. 225, 231 (1972), citing *Younger v. Harris*, 401 U.S. 37 (1971), and (3) that the injunctive relief is appropriate under applicable standards. Where, as here, a death-sentenced inmate's state conviction and sentence have been upheld on direct appeal, the authority of a federal district court or circuit court of appeals to stay an execution is limited to the circumstances set forth in 28 U.S.C. § 2251.² Before a federal court may stay an execution under § 2251, there must be a pending habeas corpus proceeding in which the petitioner has made a substantial showing of the denial of a federal constitutional right. See *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

A. *Anti-injunction Act*

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its

² The All Writs Act authorizes this Court to stay an execution pending its direct review of state collateral proceedings.

jurisdiction, or to protect or effectuate its judgments.

The "Act is an absolute prohibition against any injunction of any state-court proceeding, unless the injunction falls within one of the three specifically defined exceptions in the Act." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-50 (1988); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977) (plurality opinion); *Mitchum v. Foster*, 407 U.S. at 229; *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 286 (1970).

In *Mitchum v. Foster*, the Court expressly rejected the contention now advanced by McFarland that the Anti-Injunction Act is "merely an expression of the well-established rule of comity between state and federal courts," which must give way to "recognized principles of equity," "standards of good conscience," and "weightier federal interests" (McFarland's brief at 42, 44). *Mitchum v. Foster*, 407 U.S. at 228 (Anti-Injunction statute does not state a flexible notion of comity, but rather an absolute ban in the absence of one of the three exceptions); see also *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. at 286. Concerns of comity and federalism only come into play if, as in *Younger v. Harris*, one of the statutory exceptions first applies. See *Mitchum v. Foster*, 407 U.S. at 231 ("if § 1983 is not within the statutory exception, then the anti-injunction statute would have absolutely barred the injunction issued in *Younger*, . . . and there would have been no occasion whatever for the Court to decide that case upon the 'policy' ground of 'Our Federalism.'").

McFarland's argument also relies on mischaracterizations of the first and second exceptions to the Anti-Injunction Act. The first exception for injunctions "expressly authorized by Act of Congress" does not allow a federal court to enjoin state proceedings based on the inferred intent of federal legislation. *Mitchum*, relied upon by McFarland, is inapposite. *Mitchum* merely recognized that, in the absence of language expressly

authorizing an injunction of state court proceedings, an injunction may nonetheless come within the first exception "if there exists sufficient evidence in the legislative history that Congress recognized and intended the statute to authorize injunction of state court proceedings." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. at 633 (plurality opinion) (emphasis added).³ The fact that important federal policies may be fostered by the statute under which the injunction is sought is insufficient, by itself, to bring it within the first exception. *Id.* at 636 (plurality opinion). Thus, an inferred intent to provide for injunctive relief, derived solely from the fact that such relief arguably supports federal policies underlying the statutory provisions, does not constitute an "express authorization" in the context of the first exception. *Id.* at 636, 639 (plurality opinion).

McFarland likewise misperceives the second, "necessary in aid of jurisdiction," exception. The authority to order injunctive aid to potential jurisdiction "finds roots in traditional concepts of the relationship between inferior and superior courts of the same judicial system . . ." *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 519 n.5 (1955) (emphasis added). The second exception does not authorize injunctive relief to preserve a case or controversy if that case or controversy is not then being litigated at some stage of the federal adjudicatory process. *Id.*; *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. at 642 (plurality opinion) (the concurring Justices expressed no disagreement with the plurality's analysis of the "aid of jurisdiction" point, which was necessary to the judgment in which they concurred).

³ The concurrence neither expressly nor necessarily rejected the plurality's understanding of *Mitchum* in concluding that, under narrowly limited circumstances not present in *Vendo*, Section 16 of the Clayton Act would constitute an express exception to the Anti-Injunction Act.

B. Habeas Corpus Act

The jurisdiction of a federal habeas court to stay a state's imposition of a death sentence is controlled exclusively by the plain meaning of 28 U.S.C. § 2251, which provides in pertinent part:

A judge or justice of the United States *before whom a habeas corpus proceeding is pending*, may, before final judgment or after final judgment of discharge, pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

(emphasis added).

"[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'" *West Virginia University Hospitals v. Casey*, 111 S.Ct. 1138, 1147 (1991), citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 138 n.3 (1981). This is particularly true where the language is supported by consistent judicial interpretation. *Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980). It is only necessary to look to the legislative history of a statute in situations, unlike this one, where the statutory language is unclear. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *United States v. Turkette*, 452 U.S. 576 (1981).

In this case, there can be no basis for disregarding the plain meaning of § 2251. The import of the statutory language is clear, and that understanding is uniformly supported by the legislative history and existing decisional authority. There is no support for McFarland's arguments that § 2251 provides for the entry of a stay when a habeas petition raising constitutional

grounds for relief is not pending before the Court.⁴ Further, as discussed in section I, C, *infra*, McFarland's contention that 21 U.S.C. § 848 (q) modifies the express limitations of § 2251 and allows stays of execution under such circumstances is untenable.

The provisions of the Habeas Corpus Statute, 28 U.S.C. § 2241, *et. seq.* and the Rules Governing Section 2254 cases ("the habeas rules") make it plain that, in order for a habeas corpus proceeding to be pending, a habeas petitioner must have filed a petition identifying claims of constitutional dimension and alleging the factual support for such claims. Sections 2241 and 2242 anticipate that a habeas corpus proceeding will be initiated by the filing of a habeas corpus application.⁵ Rule 2 of the

⁴ "Pending" is defined in Webster's New Twentieth Century Dictionary as "remaining undecided; not determined; not established."

⁵ 28 U.S.C. § 2241 (d) provides:

Where an *application for writ of habeas corpus* is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the *application may be filed* in the district court for the district

28 U.S.C. § 2242 provides:

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

habeas rules specifies that an application shall be in the form of a petition in which the petitioner is required to identify all available grounds of relief and set forth the factual support for each of the grounds. *See also* 28 U.S.C. § 2242. Rule 3 specifies that the petition shall be filed and entered on the docket by the clerk of the district court only after having ascertained that the petition appears on its face to comply with the requirements of Rules 2 and 3, including the requirement of fact pleading set forth in Rule 2. Where these requirements have not been met, there is no proceeding before the federal habeas court that would justify the imposition of a stay under § 2251.

The appropriateness of the conclusion of the courts below that there was no jurisdiction to enter a stay in McFarland's case is informed by reference to the Federal Rules of Civil Procedure. Habeas corpus is a civil proceeding governed by the habeas rules, and the Rules of Civil Procedure apply only "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Fed. R. Civ. P. 81 (a) (2); Rule 11, 28 U.S.C. fol. § 2254; *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 269 (1977). Although the Federal Rules of Civil Procedure do not require the fact pleading required by § 2242 and Rule 2 of the habeas rules, the motion for stay of execution and appointment of counsel filed in this case would be insufficient to commence a civil action even under the Rules of Civil Procedure. Rule 3 of the Rules of Civil Procedure provides that "[a] civil action is commenced by filing a complaint with the court." A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 81 (a)(2). Thus, in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), the filing of a right-to-sue letter did not constitute commencement of action within the meaning of Rule 3 of the Federal Rules of Civil Procedure. "Although Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice

of what the plaintiff's claim is and the grounds upon which it rests.'" *Baldwin County Welcome Center v. Brown*, 466 U.S. at 149 & n.3. Thus, the conclusion that a habeas proceeding is pending only upon the filing of a petition is consistent with the Federal Rules of Civil Procedure.

The Court's federal habeas precedent reinforces the conclusion that, in order for there to be a pending federal habeas proceeding endowing a court with jurisdiction to stay state proceedings, a petition identifying constitutional grounds for relief must have been filed. In a series of cases addressing the authority of "next friends" to pursue federal habeas relief on behalf of death-sentenced inmates, the Court addressed jurisdictional concerns. "[F]ederal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power." *Demosthenes v. Baal*, 110 S.Ct. 2223, 2226 (1990). Article III gives the federal courts jurisdiction only over "cases and controversies." A federal court is powerless to create its own federal jurisdiction and cannot employ untethered notions of public policy to expand jurisdiction. *Whitmore v. Arkansas*, 495 U.S. 149, 155-56, 161 (1990). If a federal habeas petitioner, such as McFarland, entirely fails to allege a constitutional infirmity in the conviction or sentence of the state convicting court, federal habeas jurisdiction simply does not adhere.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), and *Autry v. Estelle*, 464 U.S. 1 (1983), the Court addressed the showing of a denial of a constitutional right that a death-sentenced inmate must demonstrate to be entitled to a stay of execution. The *Barefoot* Court upheld the Court of Appeals' expedited consideration of the habeas appeal and denial of a stay even though the district court's grant of a certificate of probable cause indicated that the petitioner had made a substantial showing of the denial of a federal right. Where an appeal is frivolous, the *Barefoot* Court noted that it is entirely appropriate

to deny a stay and dismiss the appeal after a hearing on the motion for a stay. *Id.* at 894. Further, where a second or successive petition fails to allege new or different grounds for relief, or the failure to assert the claims in a prior petition constitutes an abuse of the writ, the granting of a stay should reflect the presence of substantial grounds upon which relief might be granted. *Id.* at 895; see also *Autry v. Estelle*, 464 U.S. 1 (declining to adopt rule calling for an automatic stay, regardless of the merits of the claims presented, where the applicant is seeking certiorari review of the denial of his first federal habeas corpus petition). Since the denial of a stay is appropriate under the circumstances delineated in *Barefoot*, then it follows that it is appropriate where, as here, the individual requesting a stay to pursue federal habeas review has not identified a constitutional infirmity in his conviction or sentence. Federal habeas review exists only to review errors of constitutional dimension. *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *Townsend v. Sain*, 372 U.S. 293, 312 (1963); see also C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 4263 at 315-16 (1988 ed).

While it is not necessary in this case to look beyond the plain language of § 2251, the legislative history of the Habeas Corpus Act further supports the conclusion that an individual must have filed a petition identifying constitutional infirmities in his conviction or sentence for a federal court to have jurisdiction to stay an execution. Two distinct aspects of the legislative history support this understanding: (1) the imposition in 1908 of the requirement of a certificate of probable cause to appeal a district court's denial of federal habeas relief and (2) the repeal in 1934 of the provision for automatic stays of state court proceedings.

The Habeas Corpus Act of 1867 imposed an automatic stay of state court proceedings pending the district court's disposition of the federal habeas action and any appeals. *Barefoot v. Estelle*, 463 U.S. 892 n.3 (citations omitted). "In 1908, concerned with the increasing number of frivolous habeas

corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process, Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so." *Id.* The Committee report described the circumstances leading to the amendment.

The appeals are prosecuted without reference to the question as to whether there is any merit to the appeal, and as the statutes now stand the right of appeal is absolute.

[T]he right of appeal is absolute, and it furnishes persistent and litigious defendants with an opportunity to get the delay of from one to two years when there is absolutely no merit in their contention.

H.R. Rep. No. 23, 60th Congress, 1st Session 1-2 (1908). A statement made by Representative Littlefield on the floor of the House is apropos to the situation before the Court in this case:

[A] man might wait so late that the capital sentence would be executed on his client because he did not have time to get his application to the court, but if he exercises ordinary diligence and does not wait until about the last minute, and then take advantage of this statute and prosecute his appeal, that nobody can now prevent, he would have no difficulty in having his rights protected. It does not change the statute in that respect at all so far as the mode of procedure is concerned.

32 Cong. Rec. 608-9 (January 11, 1908).

In 1934, the Habeas Corpus Act was amended to eliminate the automatic stay provision and to authorize federal

judges to grant stays in the exercise of their discretion. Again the purpose of the amendment was to deprive defendants in state courts of a "powerful weapon to delay proceedings . . . and possibly defeat the ends of justice." 78 Cong. Rec. 12,366 (June 18, 1934).

C. *Anti-Drug Abuse Act*

1. ~~Implied authority to enter a stay may not be derived from § 848 (q) where express provisions exist in § 2251.~~

There is no basis for construing the provisions for appointment of counsel embodied in 21 U.S.C. § 848 (q) as authorizing federal courts to enter stays of execution when the conditions of 28 U.S.C. § 2251 are not satisfied. Unlike § 2251, § 848 (q) does not expressly authorize injunctive relief or address the circumstances under which a stay would be appropriate. Further, there is no legislative history or other authoritative evidence to support McFarland's inference that, in enacting § 848 (q), Congress necessarily envisioned that the federal habeas courts would be empowered to stay executions in order to appoint counsel pursuant to § 848 (q). Indeed, such intent cannot logically be imputed to the enactment of § 848 (q). The effectiveness of the provisions for appointment of counsel do not depend on a federal habeas court's ability to stay an execution, but rather depend upon a petitioner's timely request for appointment.⁶

Even if it is assumed, *arguendo*, that authority to enter a stay could be inferred from the provisions of § 848 (q), which it cannot, the specific statutory grant of authority in 28 U.S.C. § 2251 to enjoin state court proceedings must control over the

⁶ This is true regardless whether § 848 (q) is construed as proposed by McFarland to allow counsel to be appointed prior to the filing of a habeas petition.

provisions of § 848 (q). "Where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment." *Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (emphasis of Court); *Board of Governors v. MCorp Financial*, 112 S.Ct. 459, 465 (1991); *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

Moreover, when, as here, "two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. at 551. Contrary to McFarland's characterization, the provisions of § 848 (q) for appointment of counsel are not inconsistent with or defeated by the requirement of § 2251 that there be a pending habeas proceeding before a stay can be entered. As discussed *infra*, regardless whether § 848 (q) is construed to require a pending habeas petition raising substantial constitutional issues before counsel may be appointed, the § 848 (q) provisions are not frustrated by the § 2251 prerequisites for entry of a stay, but by the failure of a petitioner such as McFarland to utilize available processes in a timely fashion.

Underlying McFarland's analysis throughout is the assumption that a death-sentenced inmate is entitled to wait until immediately before a scheduled execution date to pursue state and federal habeas relief. It is only in light of this unwarranted assumption that the appointment of counsel under § 848 (q) can be implicated by the failure to authorize federal courts to stay state executions when there is no pending federal habeas petition. "What [McFarland] asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *West Virginia University Hospitals v. Casey*, 111 S.Ct. at 1148, quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926).

2. **Section 848 (q) does not constitute an express exception to the Anti-Injunction Act.**

If Congress had not enacted the express provisions of § 2251 establishing the authority of federal courts to enter a stay, § 848 (q) nonetheless could not be construed as constituting an exception to the Anti-Injunction Act's absolute prohibition. Contrary to the argument advanced by McFarland, § 848 (q) does not constitute an "express exception" under the analysis of *Mitchum v. Foster*. In *Mitchum v. Foster*, the Court applied a two-part test before concluding that 42 U.S.C. § 1983 constituted an "express exception": whether an Act of Congress (1) clearly creating a federal right or remedy enforceable in a federal court of equity (2) could be given its intended scope only by the stay of a state court proceeding. 407 U.S. at 238. Section § 848 (q) satisfies neither prong of the *Mitchum* standard.

Federal district courts and circuit courts of appeal do not sit in direct review of state convictions. *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. at 296. Rather, they are limited to the scope of federal habeas review permissible under § 2254. It follows that whether § 848 (q) is an enforceable federal right or remedy must be determined in this context. Unlike 42 U.S.C. § 1983, which is directed at state action and expressly authorizes a "suit in equity" to redress "the deprivation," under color of state law, "of any rights, privileges or immunities secured by the Constitution . . .", § 848 (q) is a procedural rule applicable only to federal proceedings. Further, unlike § 1983, § 848 (q) cannot be construed as expressly providing for a cause of action, whether for injunctive relief or otherwise.

While the scope of review under 28 U.S.C. § 2254 extends to claims that the person is in "custody in violation of the Constitution or laws or treaties of the United States," § 848 (q) is not a law enforceable under § 2254. As the Court has

recognized, habeas review of state court convictions and sentences is limited to review for error of constitutional dimension. *Smith v. Phillips*, 455 U.S. at 221; *Townsend v. Sain*, 372 U.S. at 312 (1963); see also C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 4263 at 315-16. In order to be cognizable under § 2254, a "claimed error of law [must be] 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Davis v. United States*, 417 U.S. 333, 346 (1974) (emphasis added) (provisions of § 2255 equated with those of § 2254), quoting *Sunal v. Large*, 368 U.S. 424, 428 (1962). In other words, as with errors of state law,⁷ violations of federal law must rise to the level of a due process violation. *Davis v. United States*, 417 U.S. at 346. However, there is no constitutional right to the statutory habeas remedy set forth in § 2254⁸ or to the assistance of counsel in federal habeas

⁷ *Smith v. Phillips*, 455 U.S. at 221; see also *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

⁸ Defendants have no constitutional right even to have the constitutionality of their convictions reviewed on direct appeal. *Abney v. United States*, 431 U.S. 651, 656 (1977); *McCane v. Durston*, 153 U.S. 684 (1894). The federal habeas review guaranteed by the Constitution is not the review established by statute and set forth in 28 U.S.C. § 2254. The writ mentioned in the Suspension Clause, which refers to "[t]he Privilege of the Writ of Habeas Corpus," Art. I, § 9, Cl. 2, was merely the common law writ as it existed at the time the Constitution was drafted. The writ was not considered "a means by which one court of general jurisdiction exercises post-conviction review over the judgment of another court of like authority." See *Swain v. Presley*, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring); quoting *Oaks, Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); *Stone v. Powell*, 428 U.S. 465, 474-75 (1976); *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion); *Friendly, Is Innocence Irrelevant? Collateral Attack on*

review. *McCleskey v. Zant*, 111 S.Ct. 1454, 1471 (1991) (no constitutional right to counsel in federal habeas corpus); *see also Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991) (no right to counsel in state post-conviction proceedings); *Murray v. Giarratano*, 492 U.S. 1 (1989) (same), *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (same). Therefore, it follows that the failure to provide counsel pursuant to § 848 (q) does not implicate constitutional concerns that would be cognizable in federal habeas review and, thus, cannot establish a federal right or remedy enforceable against the states by injunctive relief.⁹

As discussed *supra*, the "intended scope" of federal legislation does not render specific and long-standing statutory provisions of § 2283 inoperative even in those instances in which important federal policies are fostered by the statute under which the injunction is sought. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. at 639 (plurality opinion). This rule necessarily is of even

Criminal Judgments, 38 U. CHI. L. REV. 142, 170 (1970). The Suspension Clause does not require the federal or state governments to establish appellate or post-conviction mechanisms as part of the criminal process. Federal habeas review was first extended to state court convictions by the Habeas Corpus Act of 1867 and gave federal courts the "power to grant the writ of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." Teel, *Federal Habeas Corpus, Relevance of the Guilt Determination Process to Restriction on the Great Writ*, 37-1 SW.L.J. 519, 521 (1983). It was not until this century that plenary federal review of state court convictions became a common place feature of habeas corpus. *See Wainwright v. Sykes*, 433 U.S. 72 (1977).

⁹ Further, because McFarland is not in custody pursuant to § 848 (q), it cannot provide an independent basis for the Court's entry of a stay under § 2251.

greater force where, as here, the proponent for injunctive relief relies upon a statute that does not purport to authorize such relief and where, as in § 2251, Congress has otherwise expressly set forth the circumstances in which a stay may be entered.

In the absence of an express provision, the second prong of the *Mitchum* test requires "sufficient evidence in the legislative history that Congress recognized and intended the statute to authorize injunction of state court proceedings." *Vendo Co. v. Lektro-Vend Corp.*, at 633 (plurality opinion).¹⁰ Where, as here, there is no legislative history evincing Congressional intent to authorize injunctions of state court proceedings, there is no express exception under *Mitchum*.

Even if it is assumed, *arguendo*, that McFarland is entitled under *Mitchum* to freely construe § 848 (q) to infer intent and that McFarland correctly discerns that the intent of Congress, as revealed by the language of § 848 (q), was "that the assistance of counsel be afforded at every stage of a habeas proceeding in which the expertise of such counsel is particularly

¹⁰ As the plurality observed in *Vendo Co. v. Lektro-Vend Corp.*:

Presumptively, all federal policies enacted into law by Congress are important, and there will undoubtedly arise particular situations in which a particular policy would be fostered by the granting of an injunction against a pending state-court action. If we were to accept respondents' contention that § 16 could be given its "intended scope" only by allowing such injunctions, then § 2283 would be completely eviscerated since the ultimate logic of this position can mean no less than that virtually *all* federal statutes authorizing injunctive relief are exceptions to § 2283 statutes.

433 U.S. at 636 (original emphasis).

important" (McFarland's brief at 24), the intent to provide counsel cannot result in implied or derivative authority to enter a stay. If authority exists under § 848 (q) to appoint counsel and provide other pre-litigation assistance prior to the filing of a petition, then McFarland did not have to wait until an execution date was scheduled, much less until 5 days before the scheduled date, to file a request for counsel pursuant to § 848 (q).

D. All Writs Act

The All Writs Act, 28 U.S.C. § 1651, did not give the district court jurisdiction to stay McFarland's execution in order to appoint counsel. The Act, in pertinent part, provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Relying on *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), and *Harris v. Nelson*, 394 U.S. 286 (1969), McFarland contends that the All Writs Act authorizes the district court to stay the impending execution of an indigent inmate who is unable to prepare and file a petition, thereby filling a gap in the federal court's power. Contrary to McFarland's tortured interpretation of this Court's precedent, the All Writs Act has not been utilized to confer jurisdiction on a federal district court where there exists no case or controversy.

Because Congress in 28 U.S.C. § 2251 specifically limited the federal courts' jurisdiction to stay an execution, jurisdiction cannot be derived from the All Writs Act. "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. at 43. In *Pennsylvania Bureau of Correction*, the Court held that, because there was a specific statute encompassing the duty of the custodian to transport a prisoner, in the absence of

exceptional circumstances, the All Writs Act did not authorize the federal district court to order the marshals to transport state prisoners to the federal courthouse to testify in a 42 U.S.C. § 1983 action. The Court distinguished that case from the cases of *Harris v. Nelson*, *supra*, *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), and *Price v. Johnston*, 334 U.S. 266 (1948), explaining that in the latter three cases, the All Writs Act was necessary "to fill statutory interstices." 474 U.S. at 42 n.7. More specifically, in that trio of cases, no statute provided for the action requested of the federal district court. Here, as in *Pennsylvania Bureau of Correction*, a statute, § 2251, specifically delineates the circumstances in which the federal courts have jurisdiction to order the requested relief, and resort to the All Writs Act is unprecedented and unwarranted.

Neither Congress nor this Court has envisioned that § 1651 would, in and of itself, confer jurisdiction on a federal district court. The language in the All Writs Act, which provides that a federal court "may issue all writs necessary or appropriate in aid of their respective jurisdictions," vests power in a federal court to issue orders "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of *jurisdiction otherwise obtained*." *United States v. New York Telephone Co.*, 434 U.S. at 172 (emphasis added).¹¹ The All Writs Act cannot supply federal courts with an independent source of subject matter jurisdiction. "[I]t [is] settled beyond controversy, until Congress shall otherwise provide, that circuit courts of the United States have no power to issue a writ of mandamus in an original action brought for the

¹¹ Similarly, regarding the language in the second exception set forth in the Anti-Injunction Act, 28 U.S.C. § 2283 ("where necessary in aid of its jurisdiction,"), the Court has stated that "non-existent jurisdiction therefore cannot be aided." *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. at 519.

purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States." *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109 (1906). Thus, the All Writs Act (§ 1651 and its predecessors) is not a jurisdictional statute, but rather authorizes the federal court to issue writs necessary for the exercise of a jurisdiction already existing. *United States v. New York Telephone Co.*, 434 U.S. 159 and *Stern v. South Chester Tube Co.*, 390 U.S. 606, 608 (1968) (28 U.S.C. § 1651); *Price v. Johnston*, 334 U.S. 266 (1948) and *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942) (Section 262 of the Judicial Code, 28 U.S.C. § 377); *In re Commonwealth of Massachusetts*, 197 U.S. 482 (1905) (Section 716 of the Revised Statutes, U.S. Comp. Stat. 1901, p. 580).¹²

Relying on *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), McFarland nevertheless argues that the All Writs Act grants a federal district court the power to enjoin the execution of a state prisoner "in aid of" that court's prospective jurisdiction. McFarland's reliance is misplaced. In *Dean Foods*, the Court held that a court of appeals, which had ultimate

¹² While the legislative history of the All Writs Act is "scant," *Pennsylvania Bureau of Correction v. United States Marshals*, 474 U.S. at 41, the changes that Congress has made in the phraseology of § 1651 and its predecessors have not been substantive. *Id.*; *United States v. New York Telephone Co.*, 434 U.S. at 173; see e.g., *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942) ("Uninterruptedly from the first Judiciary Act (Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81) to the present day (Section 262 of the Judicial Code, 28 U.S.C. § 377, 28 U.S.C.A. § 377), the courts of the United States have had powers of an auxiliary nature to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.")

jurisdiction to review orders issued by the Federal Trade Commission, could grant the Commission's request for a temporary injunction to preserve the "controversy" pending before that agency. See *Sampson v. Murray*, 415 U.S. 61, 76-77 (1974). Here, in sharp contrast, McFarland did not file a habeas petition in the district court alleging specific constitutional deficiencies in his conviction or sentence, and thus, as previously discussed, there was no case or controversy to confer jurisdiction on the district court. See *Whitmore v. Arkansas*, 459 U.S. 149.

Dean Foods simply stands for the proposition that when a federal court has an obligation to review an inferior adjudicatory body's decision on the merits, the court may invoke the All Writs Act to protect its future jurisdiction to perform that obligation. Indeed, referring to the All Writs Act, this Court has observed "it has never been authoritatively suggested that this example of injunctive aid to a potential jurisdiction, which finds roots in traditional concepts of the relationship between inferior and superior courts of the same judicial system, has any relevance where the offending action sought to be enjoined is insulated by two intervening and essentially unrelated systems, one of an administrative rather than judicial nature, the other the manifestation of a distinct sovereign authority." *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. at 519 n.5.

A federal district court, unlike this Court, does not have potential appellate jurisdiction over federal questions previously raised in state court. *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers*, 398 U.S. at 296; see also *Smith v. Phillips*, 455 U.S. at 221 ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."). Here, assuming that any constitutional claim in a "future" federal petition will have been exhausted in the state courts pursuant to 28 U.S.C. § 2254(b), any previous jurisdiction over a case or controversy between McFarland and the state would lie in the state courts, not the federal district court.

Further, *Dean Foods* did not involve the Anti-Injunction Act and does not lend any support for the proposition that the invocation of the All Writs Act enables a stay applicant to circumvent either the absolute prohibition in the Anti-Injunction Act or the specific grant of authority in § 2251 regarding the stay of state court proceedings. In *Dean Foods*, the preliminary question was whether, in the *absence* of express statutory authority, the Commission could petition the court of appeals for injunctive relief. See *Sampson v. Murray*, 415 U.S. at 76 n.33; 384 U.S. at 608. The difference between that type of case and one involving an express prohibition on injunctions, as in the instant case, is critical. See *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987); citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

McFarland met neither requirement implicit in *Dean Foods*. First, no petition alleging constitutional error had been filed, and thus, no case or controversy existed in the federal district court. Second, the federal district court did not have prospective *appellate* jurisdiction to review any constitutional claim previously raised in the state court proceedings. Clearly, if the "necessary in aid of jurisdiction" language employed in the Anti-Injunction Act and the All Writs Act were extended in the manner proposed by McFarland to cases that had not yet entered the federal adjudicatory process and to unidentified, prospective controversies, the Anti-Injunction Act, as well as the express limitations of §2251, would be rendered meaningless.

McFarland also relies on *Woodard v. Hutchins*, 464 U.S. 377 (1984), and *Lenhard v. Wolff*, 443 U.S. 1306 (1979), for the proposition that the federal district court could have stayed his execution pursuant to §1651. In *Woodard v. Hutchins*, a circuit judge had jurisdiction to consider the inmate's application for a stay of execution pursuant to § 1651. In that case, unlike the case at bar, the stay applicant had filed a federal habeas petition pursuant to § 2254 in the district court alleging constitutional violations. The district court had denied a stay but did not rule on the petition. *Id.* at 381 (Brennan, J., dissenting).

Accordingly, there was an existing case or controversy that the court of appeals had ultimate jurisdiction to review, and the circuit judge therefore had prospective appellate jurisdiction of the *pending case*. Likewise, in *Lenhard v. Wolff*, 443 U.S. 1306, 1309 (1979), the death-sentenced inmate's attorneys, acting as next friend, had petitioned the federal courts for habeas relief alleging "substantive constitutional arguments," and thus, there was an issue before the Court.¹³

Finally, McFarland incorrectly argues that the All Writs Act grants the district court authority to appoint counsel to prepare a petition for federal habeas corpus relief. There are two specific provisions for federal courts to appoint counsel, § 848(q) and 18 U.S.C. § 3006A(a). As previously set forth, the All Writs Act pertains to areas not otherwise covered by statute, *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. at 43, and therefore is inapplicable.

¹³ McFarland notes that this Court, in a memorandum opinion, denied a petition for writ of certiorari "without prejudice to [file] an application for a writ of habeas corpus in the appropriate United States District Court." *Land v. Florida*, 377 U.S. 959 (1964). The Court extended the previously imposed stay of execution for 60 days to allow the petitioner to file a federal petition and ordered that if the federal petition were filed, the stay would be continued pending disposition of the petition. It does not appear from the brief opinion that the Court's authority to grant such a stay was in question. In any event, it does not follow that simply because this Court has the power to grant an extraordinary writ, a federal district court likewise does. Cf. *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers*, 398 U.S. at 296 ("Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that *broader jurisdiction* allows this Court correspondingly *broader authority to issue injunctions 'necessary in aid of its jurisdiction.'*") (emphasis added).

II. Enjoining a state execution when no constitutional infirmity in the conviction and sentence has been identified is contrary to long standing concerns of federalism and comity.

Even if there were authority to enjoin an execution under the circumstances presented here, where no constitutional infirmity has been identified in the conviction or sentence, it would impermissibly impinge on the traditional interests of federalism and comity that permeate the Court's habeas corpus jurisprudence. Where no constitutional infirmity has been identified, the imposition of a state's presumptively valid death sentence should not be stayed to allow a petitioner to raise as yet unidentified claims in an as yet uninitiated action. The entry of a stay under such circumstances transforms federal habeas review into an event at least co-equal in importance to the trial itself.

The criminal trial is the main event at which "[t]o the greatest extent possible all issues which bear on th[e] charge should be determined . . .," *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), and direct review is the principal avenue for challenging a conviction. *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1719 (1993). Historically, habeas review is the extraordinary remedy, a safeguard to afford relief to those grievously wronged--those whose convictions violate "fundamental fairness." *Id.* at 1719, 1721.

[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review--which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari--comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is

secondary and limited. Federal courts are not forums in which to relitigate state trials.

Barefoot v. Estelle, 463 U.S. at 887. The concern that "federal intrusions into state criminal trials frustrate . . . the States' sovereign power to punish offenders" is only enhanced where, as here, that intrusion is not based on constitutional concerns. *Brecht v. Abrahamson*, 113 S.Ct. at 1720.

Nonetheless, advocates on behalf of death-sentenced inmates seek to transform federal habeas review into the "main event," in which not only to relitigate the trial itself, but in which every facet of the pre-trial and trial process is investigated for error, regardless whether there is any indication that there was in fact error and regardless how tangential any error may be to fundamental fairness or the accuracy of the determinations of guilt or sentence. For this reason, the time and resources spent in collateral review litigation are grossly disproportionate to the limited purpose of such review and normally far exceed the time allotted to trial preparation and the trial itself.

In his delineation of the roles of counsel and experts and the time necessary to pursue federal habeas review, McFarland clearly envisions federal habeas review as the main event. McFarland not only identified 120 days as the necessary amount of time to adequately prepare a writ application, JA 17, he also identifies as essential to such review the assistance of "investigators, social workers, mitigation experts, psychologists and psychiatrists, firearms and ballistics experts, pathologists, serologists, trace evidence experts, and others who can identify, probe, and draw conclusions regarding relevant facts through their expertise." McFarland's brief at 27.

If pre-petition stays were routinely entered upon request only days before a scheduled execution date without requiring a death-sentenced inmate to demonstrate that there exists a potential constitutional infirmity in his conviction or sentence, there would be no incentive to initiate state and federal habeas

review in a timely fashion, regardless how long a state waited to set an execution date. Indeed, McFarland's motions for appointment of counsel and a stay are clearly based on the presumption that collateral review need not be initiated until an execution date has been set and that pre-execution stays should be routinely entered.

III. The so-called "crisis in representation" of death-sentenced inmates in Texas results from a deliberate manipulation of existing process.

The issue before the Court is whether a federal habeas court has jurisdiction to stay an execution in order to appoint counsel for a death-sentenced inmate when that inmate has not filed a petition identifying error of constitutional dimension in his trial or sentencing procedure. While the resolution of the jurisdictional issue is strictly governed by the Anti-Injunction Act and 28 U.S.C. § 2251 and may not be influenced by equitable considerations, McFarland attempts to sway the Court's decision by delineating a "crisis in representation" of Texas death row inmates. This so-called "crisis in representation" is nothing less than a deliberate manipulation of existing procedures. See *McFarland v. Collins*, 8 F.3d 256, 258 (5th Cir. 1993) (Jones, J., dissenting) ("Contrary to the representation of counsel for the Texas Resource Center, this case became a manufactured procedural emergency long before it reached federal court.").

McFarland attributes his failure to identify and brief constitutional grounds for relief in a federal habeas petition to (1) the lack of a singular, routine procedure for securing counsel to assist death-sentenced inmates in state habeas review and (2) the United States District Court's failure in *Gosch v. Collins*, No. SA-93-CA-731, slip op. (W.D. Tex. September 16, 1993), to stay a scheduled execution and appoint counsel upon the Center's filing of a "perfunctory petition" raising "one thin claim of a Constitutional defect." See *Gosch v. Collins*, No. 93-8635, slip op. (5th Cir. September 16, 1993) (attached hereto as

Appendix A). According to McFarland, a petition raising one ground for relief was filed in *Gosch* merely to give the district court jurisdiction to enter a stay and appoint counsel. McFarland reasons that, when the *Gosch* district court denied relief on the merits of that claim, this procedure for endowing the district court with jurisdiction to enter a stay and appoint counsel was no longer viable and he necessarily had to approach the federal habeas court without raising a constitutional basis for relief or risk having a subsequent petition dismissed for abuse of the writ. However, neither of the factors identified by McFarland explains his conduct or the conduct of the Center in this case.

A. Procedures for securing counsel to assist death-sentenced inmates in state habeas review

In Texas, counsel to assist death-sentenced inmates in pursuing collateral review are either appointed pursuant to Article 1.051 of the Texas Code of Criminal Procedure or are recruited by the Center. Rule 233 of the Texas Rules of Appellate Procedure authorizes a trial court to modify or withdraw an execution date if a state habeas application is pending. *Ex parte Lockart*, ___ S.W.2d ___, No. 25-669-01, slip op. (Tex.Crim.App. November 22, 1993) (attached hereto as Appendix B).

Generally, despite the apparent limitations of Texas Rule of Appellate Procedure 233, trial courts routinely withdraw or modify execution dates to allow time for recruited or appointed counsel to file an original or amended state writ application. In letters similar to the October 21, 1993, letter to the Texas Court of Criminal Appeals, JA 24-29, the Center identified 18 inmates as facing execution dates without the assistance of counsel between November 1, 1993, and January 31, 1994. Of these

inmates, the execution dates of 14 were modified or withdrawn by the trial court to facilitate state habeas review.¹⁴ Appendix C.

1. McFarland's case

Tarrant County assistant district attorneys assured the Center that the District Attorney would not oppose a stay if a state habeas petition was filed. As Judge Jones noted in her dissent to the dismissal of the appeal of McFarland's first petition (and second tour of the federal courts): "Why the Resource Center never chose to invoke this eminently reasonable option [filing a petition] either in either state or federal court until 5:45 p.m. on the eve of execution is a complete mystery" *McFarland v. Collins*, 8 F.3d at 259.

Given the resources of the Center--a budget of between \$2,700,000 and \$4,100,000 and a staff of at least fifteen attorneys--the assertion that they were personally unable to assist McFarland in formulating a state habeas application in the allotted time period is hardly credible. See Amicus Brief of Bexar, Dallas, Harris, and Tarrant Counties. Certiorari review of the Texas Court of Criminal Appeals' decision on direct appeal was denied on June 6, 1993, and on August 16, 1993, McFarland's execution was scheduled for September 23, 1993. On September 20, the September 23 execution date was withdrawn and McFarland's execution was rescheduled for October 27, 1993, more than four months following the denial of certiorari review. Thus, the Center had been afforded precisely the amount of time, 120 days, that it routinely asserts is necessary to recruit counsel. At the time of McFarland's second scheduled execution date, the Center had been connected with his case for ten months. Moreover, although McFarland

¹⁴ In the past five years, on the average, 21 individuals have been assigned to death row each year. The Texas Court of Criminal Appeals affirmed 31 capital convictions and sentences in 1992 and 59 in 1993. Appendix D.

executed his *in forma pauperis* affidavit on September 21, 1993, he did not file a state writ application and raised only one ground for relief in the petition filed 35 days later in federal court. *McFarland v. Collins*, 8 F.3d at 259 n.3.

If the Center did not anticipate being able to recruit counsel in the time allowed by the court and was itself actually unable to provide initial representation, then it was incumbent upon Center attorneys to approach the convicting court in a timely and procedurally correct manner and request appointment of counsel. They did not do so. Rather, they waited until four days before the first scheduled execution date, and more than three months after the date was set, to approach the trial court by letter. In correspondence addressed by the Center's directors to the convicting court on September 19, 1993, four days before the first scheduled execution date, and on October 16, 1993, eleven days before the second scheduled execution date, the Center asked the convicting court to either appoint counsel or allow it 120 days to recruit counsel and to allow appointed or recruited counsel 120 days to compile a state habeas application. However, a motion to stay or withdraw the execution date was not filed with the clerk of the convicting court. JA 89-90.

McFarland's failure to file a state habeas application cannot even arguably be attributed to the district court's actions in *Gosch*. Had the filing of a perfunctory state habeas petition in the convicting court not resulted in a modification or stay of the execution date, McFarland could have limited his filings in the federal district court to motions for appointment of counsel and a stay of execution.

The Center's conduct in McFarland's case is, at best, unwarranted and unexplainable. As Judge Jones noted:

It is also a mystery why the first real habeas petition on the merits was filed in federal court rather than state court. Competent litigators in any other area of practice would have reviewed

their options when the execution date was set in August and would have begun preparing a habeas petition well before the 11th hour.

McFarland v. Collins, 8 F.3d at 259 (Jones J., dissenting).

2. Attempts to reform procedure in state habeas review of capital cases to provide for the appointment of counsel

In the 1993 session of the Texas Legislature, Representative Pete Gallego introduced legislation that would have amended state habeas procedure in capital cases. The legislation, HB 1562, which was passed by the House of Representatives, provided for counsel, who were to be compensated, to be appointed immediately after the entry of judgment to assist death-sentenced inmates in state habeas review. See HB 1562 attached hereto as Appendix E at 2, 11. The final version of the bill provided for a "semi-unitary" procedure in which the state habeas application would be filed 150 days after the State's brief was filed on direct appeal. Appendix E at 3. The final bill also foreclosed the setting of an execution date until after the Court of Criminal Appeals had entered judgment on an initial petition for writ of habeas corpus and required execution dates to be set at least 60 days in advance. Appendix E at 11, 12. The claims raised in a subsequent or untimely petition would be considered only in certain, limited circumstances. Appendix E at 4-6.

HB 1562, which would have eliminated the potential abuse of the system that has now been characterized as a "crisis in representation," was opposed by the organized defense bar, including the Texas Criminal Defense Lawyers Association and the Texas Appellate Practice and Education Resource Center. See Policy Statement of Texas Criminal Defense Lawyers Association and endorsements, attached hereto as Appendix F, and Minutes of the April 14, 1993 meeting of the House Committee on Criminal Jurisprudence attached hereto as

Appendix G at 2, 6. The bill died in the Texas Senate as a consequence of this opposition. See Press Release, Gallego Will Try Again to Eliminate Unwarranted Delays in Capital Murder Cases, attached hereto as Appendix H. On February 8, 1994, Representative Gallego announced his intention to introduce identical legislation in the 1995 session of the Texas Legislature. *Id.*

The Center's opposition to HB 1562 makes clear its motive for the "brinkmanship" in this case. The alleged "crisis in representation" resulted from the Center's manipulation of existing process and intense lobbying that led to the defeat of legislation that would have remedied the potential for such manipulation. Where, as is the case in Texas, the federal government has endowed a public defender organization such as the Center with sufficient resources to assure representation at all phases of state and federal habeas review, such abuse of the system should not be rewarded.

B. Procedures for securing counsel to assist death-sentenced inmates in federal habeas review

If it is assumed, *arguendo*, that McFarland correctly characterizes § 848 (q) as authorizing the appointment of counsel in the absence of a pending habeas action, it was incumbent upon the Center, after approaching the trial court in a timely manner, to also approach the federal district court in a timely manner and request the appointment of counsel. In light of the Center's anticipated inability to recruit counsel or provide representation itself, its failure to test its alleged understanding of the operation of § 848 (q) as well as other identified statutory provisions at the first opportunity and the decision to wait until the day of the scheduled execution to seek federal appointment of counsel is again, at best, unwarranted and unexplainable.

McFarland proceeds on the unsubstantiated assumption that death-sentenced inmates, unlike other inmates, are uniformly unable to file rudimentary petitions and initiate the

process of federal habeas review. Pursuant to Habeas Rule 2, district courts must provide prospective petitioners with forms that identify potential grounds for relief. These forms are available to death-sentenced inmates as well as those in the general population. If the Center was unable to assist McFarland in formulating his initial federal petition, it surely was incumbent upon the Center to advise him regarding proceeding *pro se*. Instead of filing a *pro se* petition, McFarland apparently chose to engage in the brinkmanship described above and, as a result, a stay was entered only minutes before his scheduled execution. One can only assume that McFarland's decision to employ the tactics at issue here was made after he was fully advised of his options, including that of initially proceeding *pro se* in federal habeas, identifying arguable bases for relief, and requesting the appointment of counsel.

IV. The authorization of federal courts to stay state executions in order to appoint counsel must not eviscerate the exhaustion requirement or deprive the states of procedural defaults.

If the Court finds that there is jurisdiction to enter a stay and appoint counsel when a petitioner approaches federal habeas review without the assistance of counsel, it should not thereby eviscerate the requirement that a petitioner exhaust his state remedies. There is no constitutional right to state habeas review or the assistance of counsel in such review. Further, as demonstrated, in Texas, any failure in the mechanisms for securing counsel for state habeas review is largely attributable to the machinations of the entities now asserting that the mechanisms are inadequate. Under these circumstances, if a petitioner fails to avail himself of the state collateral review process and seeks the appointment of counsel in federal court, the State must be afforded the opportunity to rely on the exhaustion requirement and compel the petitioner to return to state court. Alternatively, if in a particular case the state collateral process has been rendered inadequate or unavailable, any claims that would be foreclosed by the state's procedural

default doctrine must be correspondingly barred in federal habeas review. *Teague v. Lane*, 489 U.S. 288, 297-98 (1989).

CONCLUSION

For the above reasons, the Director requests that the Court of Appeals' denial of McFarland's motion for stay of execution and appointment of counsel be affirmed.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
for Criminal Justice

*MARGARET PORTMAN GRIFFEY
Assistant Attorney General
Chief, Capital Litigation Division

STEPHANI A. STELMACH
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

*Counsel of Record

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 93-8635**

LESLEY LEE GOSCH,

Petitioner-Appellant,

versus

**JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division**

Respondent-Appellee.

**Appeal from the United States District Court
for the Western District of Texas
(SA-93-CA-731)**

**Before JOLLY, WIENER and EMILIO M. GARZA, Circuit
Judges.**

PER CURIAM:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

ORDER

IT IS ORDERED that the application of Petitioner-Appellant Lesley Lee Gosch for stay of execution, which is scheduled to be carried out before sunrise on September 17, 1993, and for a Certificate of Probable Cause (CPC) from this court be and they are hereby DENIED.¹ No useful purpose would be served at this hour in writing separately when, as here, we find the reasoning of the district court in its Order of September 15, 1993, denying Petitioner's application for stay of execution, and in that court's more extensive explication of Petitioner's case in the Memorandum Opinion and Order of even date denying Petitioner's petition for federal habeas relief, to be both correct and complete.

We also affirm the judgment of the district court denying Petitioner's Petition for a Writ of Habeas Corpus, again for the reasons expressed by the district court. Our review of this case from its very beginning reveals that Petitioner has raised but one thin claim of a Constitutional defect with his case and that is his Penry claim. We agree completely with the district court's disposition of that claim, which we too find to be frivolous.

Nonetheless, we have given full consideration to each argument advanced by counsel for Petitioner in briefs and memoranda to the state courts of Texas and to the district court, and have found those arguments to be without sufficient Constitutional merit to justify a stay, a grant of CPC, or habeas relief-again, for the reasons set forth by the district court in its thorough and well reasoned opinion of September 15, 1993.

¹ The district court should not have granted CPC once it held Petitioner's Petition for Habeas Corpus to be without merit. We therefore vacate the district court's Order granting CPC under those circumstances. We are convinced that, in the final analysis, Gosch's claims for habeas corpus in this case are indeed frivolous and will not support a grant of CPC.

Moreover, we are not impressed with Gosch's argument that his counsel has not had adequate time to know of and present, at least superficially, other more meritorious issues that might be brought to our attention. As the district court noted, counsel for Petitioner has been generally familiar with this case for some months; we think that is ample time within which to have made at least some bare suggestion of a substantial federal claim if indeed there were any. We are satisfied that there are none.

In adopting the findings and reasoning of the district court for denying habeas relief, we would only repeat this court's oft-stated position, echoing the position of the Supreme Court as set forth in Barefoot v. Estelle, 463 U.S. 880, 888, 103 S.Ct. 3383, 77 L.Ed.2d 1090, 1101 (1983), that, while "federal courts must isolate the exceptional cases where Constitutional error requires retrial or resentencing as certainly and as swiftly as orderly procedure will permit," the district courts must give careful attention to non-frivolous claims of Constitutional error. In that regard, we have specified first that the district courts must review the state court records of those cases in which adequate assessment depends on such review, and that - in order to permit appellate review - the district court is constrained to rule with reasons, issue by issue, on points raised in the petitioner's application for habeas relief. We find that the district court in the instant case has complied with those constraints.

Even though the relief here sought formally comes to us only at the eleventh hour, we have followed it and studied it closely ever since collateral relief was first sought for Petitioner in the courts of Texas and more recently in the federal district court. As instructed by the Supreme Court in, inter alia, Barefoot, supra, we are not denying the application for stay or the petition for habeas corpus under time constraints that might otherwise pretermitt sufficiently careful merits consideration by this court to ensure that justice would not be denied Petitioner solely for lack of time for us to deliberate.

APPENDIX B

EX PARTE MICHAEL LEE LOCKHART

WRIT NO. 25,669-01 **Motion for Stay of Execution**
 From BEXAR County

ORDER

This Court affirmed applicant's capital murder conviction and sentence of death on direct appeal. *Lockhart v. State*, 847 S.W.2d 568 (Tex.Cr.App. 1992). The trial court has scheduled applicant's execution to be carried out on or before sunrise, November 23, 1993.

By the instant motion, applicant seeks a stay of execution in order to allow time for the Texas Resource Center to recruit an attorney to represent him and prepare a post conviction application for writ of habeas corpus under Art. 11.07, V.A.C.C.P.

Applicant first presented his motion for a stay of execution to the convicting court. The trial court denied the relief requested after noting no colorable claim for habeas corpus relief is set forth in the motion and no effort has been made to invoke the trial court's jurisdiction. See Tex.R.App.Pro. Rule 233.

We find we do not have jurisdiction to grant the relief requested by applicant. The granting of such relief would in no manner tend to protect this Court's jurisdiction or enforce a judgment of this Court. See Tex.Const., Art. V, Sec. 5. Therefore, the relief sought is denied.

IT IS SO ORDERED THIS THE 22ND DAY OF
NOVEMBER, 1993.

PER CURIAM

En banc
Publish
Overstreet, J., dissents.

EX PARTE MICHAEL LEE LOCKHART

WRIT NO. 25,669-01

Motion for Stay of Execution

From **BEXAR** County

CONCURRENCE TO ORDER

I join the Order of the Court denying applicant's motion for a stay of execution. However, to place this last minute motion in proper prospective, I hereby incorporate the Order of the trial court issued earlier this date in this concurrence.

McCormick, P.J.

En banc
Publish
Delivered: November 22, 1993

No. 88-CR-3197
IN THE 186TH DISTRICT COURT
OF BEXAR COUNTY, TEXAS

STATE OF TEXAS VS.
MICHAEL LEE LOCKHART

ORDER

This defendant has just filed a motion seeking to have this Court issue a stay of execution which is presently set for Tuesday, November 23, 1993. The defendant was convicted and sentenced to death on October 25, 1988.

This conviction was affirmed by the Texas Court of Criminal Appeals and rehearing was denied February 24, 1993. (847 SW2d 568). It appears that rather than seek habeas corpus relief after that date, the defendant elected to file a direct petition with the United States Supreme Court which denied him relief on October 4, 1993. (114 S.Ct. 146; 62 L.Week 3247).

In his motion for stay, the defendant alleges that he desires to file a post conviction application for habeas corpus relief but that he has no counsel. He also alleges he has been assisted in his present claim by attorneys from the Texas Resource Center. The Court has also just received a letter from the Texas Resource Center dated November 17, 1993.

In that correspondence, Mandy Welch, Executive Director of the Texas Resource Center advised that "the Center should provide you with any information it believes to be relevant to the trial court in Mr. Lockhart's future proceedings." She further indicated the duty of the Center was "to recruit and assist counsel for death row inmates in state court."

Finally, she stated: "The existence of an imminent execution date makes it virtually impossible to recruit qualified counsel. Few attorneys will consider taking a case without some

assurance that they can become familiar with the case and provide adequate representation before being faced with an execution date."

ISSUE

The issue that must be considered is whether the defendant has justified his request for a stay to enable counsel to be found to represent him or whether his current status is the result of a deliberate and calculated manipulation of the Texas criminal justice system.

The defendant was represented on direct appeal by court appointed counsel, Mr. Doug Barlow. On December 17, 1992, Mr. Barlow informed Jeffrey Pokorak of the Texas Resource Center (TRC) that he would not file a motion for rehearing with the Texas Court of Criminal Appeals.

FINDINGS OF FACT

The Court finds as facts based on affidavits furnished to the Court and made a part of this record:

1. On December 17, 1992, the same date Mr. Barlow indicated he would not seek rehearing before the Court of Criminal Appeals, Eden Harrington of TRC requested a 45 day extension of time in which counsel could be recruited and file a motion for rehearing. That extension was granted by the Court of Criminal Appeals until Feb. 1, 1993.

2. On January 14, 1993, TRC checked out the appellate record.

3. On February 2, 1993, a motion for rehearing was filed with the Court of Criminal Appeals by Stephanie L. Barclay.

4. On February 8, 1993, the defendant wrote to TRC.

5. On February 10, 1993, the defendant was visited by Phyllis L. Crocker of TRC. On every visit, TRC attorneys signed a form indicated they "affirm that my visit with this inmate is for the purpose of assisting me in matters relating to the attorney-client or attorney-witness relationship and no other purpose."

6. On February 11, 1993, TRC corresponded with the defendant.

7. On February 17, 1993, the defendant corresponded with TRC.

8. On February 23, 1993, TRC corresponded with the defendant.

9. On February 24, 1993, the Court of Criminal Appeals denied rehearing.

10. On February 24, 1993, TRC Corresponded with the defendant.

11. On March 23, 1993, TRC corresponded with the defendant.

12. On May 24, 1993, the defendant corresponded with TRC.

13. On May 25, 1993, the defendant filed a Cert. Petition with the United States Supreme Court, being represented by Daniel Givelber, 400 Huntington Avenue, Boston, MA 02115. The record does not reflect how Mr. Givelber came to be counsel, but the clear implication is that he entered the case through TRC. In his motion, the defendant state: "I was represented in the Supreme Court by Daniel

Givelber. Mr. Givelber's representation was limited to my certiorari proceedings . . ."

14. On July 2, 1993, this court scheduled execution for November 23, 1993. The Court specifically provided almost 5 months for the defendant to initiate post-conviction proceedings.

15. On July 13, 1993, the Institutional Division received the death warrant and notified the defendant.

16. On July 14, 1993, the very next day, the defendant was visited by Lynn Lamberty of TRC with whom he had previously corresponded on May 24, 1993. Neither the defendant nor TRC took any action in the trial Court until almost 5 months thereafter and immediately prior to his scheduled execution date.

17. On October 4, 1993, the Supreme Court denied relief.

18. On October 27, 1993, TRC corresponded with the defendant.

19. On November 5, 1993, the defendant was visited by Elizabeth Cohen of TRC.

20. On November 10, 1993, the defendant was visited by Lynn Lamberty of TRC.

21. On November 12, 1993, the defendant was visited by Lynn Lamberty of TRC.

22. On November 17, 1993, the defendant filed a pro-se motion for stay claiming he had no counsel or access to counsel.

23. On November 19, 1993, the TRC notified the court that Gregory Burr Macaulay of Washington D. C. was willing to undertake representation in this case subject to specified conditions:

- pay him \$50 per hour
- pay for 7-10 trips to Texas for himself and either co-counsel or his paralegal
- appoint a second counsel at the same rate
- appoint a full time paralegal
- receive periodic payments monthly
- receive 180 days in which to file a petition for habeas corpus application

CONCLUSIONS

Both the defendant and the Texas Resource Center have had more than ample time to recruit and obtain counsel to file an application for habeas corpus relief since his conviction was affirmed on February 24, 1993. 9 months have passed since that date. The Texas Resource Center located an attorney willing to represent the defendant just 2 days after filing the motion for stay.

The defendant and the Texas Resource Center have deliberately and intentionally manipulated access to habeas corpus review as a matter of strategy and not the result of legitimate misfortune.

The defendant has been in virtually constant contact with TRC even before this conviction was affirmed by the Court of Criminal Appeals.

Neither the defendant or TRC has requested the appointment of counsel in a period of almost 9 months. It is only on the very verge of execution that the defendant claims a need for help in representation - help that at least one lawyer was willing to give under certain conditions but ONLY on the eve of execution.

Further, nobody has even advanced a meritorious ground of relief that if found to exist would result in a beneficial ruling to the defendant.

No one has explained why nothing was done by either the defendant or TRC until days before his scheduled execution. No counsel was recruited nor is there any showing of any attempt at recruitment. No request for the appointment of counsel was advanced by the defendant. Yet during all of this time, the defendant and TRC were meeting and corresponding on a regular and frequent basis. On each meeting, TRC attorneys affirmed that the visit was solely "related to the attorney-client . . . relationship and for no other purpose."

By waiting until shortly before execution to request counsel and a stay, both the defendant and TRC are dangling his life in a perilous maneuver deliberately contrived to pressure the legal system to delay his execution. The defendant is an emergency he and TRC created, and this type of manipulation should not be permitted to prevail by any Texas or Federal Court.

The record does not support the TRC claim that their purpose is limited to recruitment of counsel. The record is full of instances where TRC, when it elected to do so, represented this defendant. TRC attorneys sought and received from the Court of Criminal Appeals, an extension to file a motion for rehearing. They obtained the appellate record. They frequently visited the defendant certifying on each occasions that the visit was in furtherance of the attorney-client relationship. And finally, they prepared and filed the defendant's "pro-se" application for stay and other related motions, acting at all times as his legal representative.

The status of TRC can not, like the tide, roll in and roll out when it suits their purpose. They either represent someone or they don't. If they don't, then they should not be heard on any issue as they have no standing. If they do, then they should be

held to the same "effective representation" standards they so often use against others. And effective representation certainly requires that legal issues be addressed in a timely and orderly manner.

Their deliberate strategic plans have resulted in many other defendants receiving a stay. In fact, a stay under these circumstances has become virtually automatic and the expectations of defendants and TRC have been fulfilled. As long as courts continue to permit defendants and TRC to manipulate the orderly administration of justice, they will continue to successfully do so.

This Court does not and will not approve of such dilatory actions that cause the disruption of our legal system. The motion for stay is hereby DENIED, and the Court further strongly urges that the Court of Criminal Appeals and the Federal Courts do likewise. To do otherwise will permit this type of sham to perpetuate, proliferate and continue to bring discredit and disrespect to our legal system.

The clerk will immediately serve this notice by telephone and FAX to:

1. The Clerk of the Court of Criminal Appeals
2. The Clerk of the 186th District Court of Bexar County
3. The District Attorney of Jefferson County, Texas
4. The Attorney General of Texas
5. The Texas Resource Center
6. The Defendant

The Clerk will also immediately transmit all documents in this cause by Express Overnight Mail to the Clerk of the Court of Criminal Appeals.

Since this case originated in Jefferson County, the District Clerk of Jefferson County is ordered to perform all of the actions reflected in this Order.

Signed and entered November 22, 1993.

Larry Gist, Judge Presiding

Lockhart

10/25/88 Conviction and Sentence

12/2/92 Court of Criminal Appeals--aff'd

12/5/93 Correspondence, Court Crim. App. to Lockhart

12/10/92 Correspondence, Barlow, appellate counsel, to Lockhart

12/17/92 Barlow informed Jeffrey Pokorak (TRC) that he would not file motion for rehearing.

12/17/92 Eden Harrington (TRC) requests 45 day extension of time in which to recruit counsel and file motion for rehearing. Extension until 2/1/93 granted by Court Crim. App.

12/21/92 Correspondence, Court Crim. App. to Lockhart

1/14/93 TRC checked out appellate records (-21)

2/2/93 Motion for rehearing filed in Court Crim. App. by Stephanie L. Barclay

2/4/93 Correspondence, Court Crim. App. to Lockhart

2/8/93 Correspondence, Lockhart to TRC

2/10/93 TRC (Phyllis L. Crocker) visit

2/11/93 Correspondence, TRC to Lockhart

2/17/93 Correspondence, Lockhart to TRC

2/23/93 Correspondence, TRC to Lockhart

2/24/93 Court Crim. App.--reh'g denied

2/24/93 Correspondence, TRC to Lockhart

3/4/93 Correspondence, Court Crim. App. to Lockhart

3/19/93	Correspondence, Virgil Clark, atty, Toledo, OH, to Lockhart
---------	---

3/23/93 Correspondence, TRC to Lockhart

3/26/93 Correspondence, Court Crim. App. to Lockhart

4/1/93	Correspondence, Lockhart to Virgil Clark, atty, Toledo, OH
5/24/93	Correspondence, public defender of Indiana to Lockhart

5/24/93 Correspondence, Lockhart to TRC, Lynn Lamberty,

5/25/93 Supreme Court--Cert. petition filed by Daniel J. Givelber, 400 Huntington Ave, Boston, MA 02115

7/2/93 Trial court--Order scheduling execution for 10/23/93

7/13/93 S.O. Woods office received death warrant, Lockhart's custody status was changed because of scheduled execution.

7/13/93 Log book in death row office shows that Lockhart was notified of new execution date by Sgt Cabeen

7/14/93 TRC (Lynn Lamberty) visit

8/6/93	Correspondence, public defender of Indiana to Lockhart
8/9/93	Correspondence, Lockhart to public defender of Indiana

8/24/93 Supreme Court--Brief in opposition filed

9/1/93	Correspondence, Lockhart to public defender of Indiana
9/1/93	Correspondence, Supreme Court of Florida to Lockhart
9/2/93	Correspondence, public defender of Indiana to Lockhart
9/7/93	Correspondence, Lockhart to public defender of Indiana
9/17/93	Correspondence, public defender of Indiana to Lockhart

10/4/93 Supreme Court--Cert denied

10/13/93 Correspondence, COCA (Court of Crim App) to Lockhart

10/27/93 Correspondence, TRC to Lockhart

11/1/93 Correspondence, Lockhart to TRC

11/5/93 TRC (Elizabeth Cohen) visit

11/10/93 TRC (Lynn Lamberty) visit

11/12/93 TRC (Lynn Lamberty) visit

11/17/93 Trial court (Bexar)--pro se motion for stay or modification of execution date to allow TRC to recruit counsel. Request 120 days to recruit, 120 days to file.

EX PARTE MICHAEL LEE LOCKHART

Habeas Corpus Application
From BEXAR County

Writ No. 25,669-01

OPINION DISSENTING TO ORDER

As the summary order of the Court indicates, this applicant is without counsel, yet is scheduled to be put to death at an early morning hour of Tuesday next. Thus, without benefit of counsel he is reduced to filing pro se his first post-conviction petition for a writ of habeas corpus and representing himself because this Court refuses to grant his motion to stay his impending execution so that the Texas Resource Center may recruit competent counsel to assist and to represent him.

I respectfully dissent, urging this Court to confront headon "the crisis stage in capital representation" in this State. The Spangenburg Group, A Study of Representation of Capital Cases in Texas (State Bar of Texas), at i-ii.

Meanwhile, we should consider the motion and supporting papers as pleadings in the nature of an application for extraordinary relief, thereby invoking the constitutional original jurisdiction of this Court under Article V, §5, para. three, and as further prescribed by Article 4.04, §1, V.A.C.C.P.

On that basis we should cause the Court to stay the scheduled execution of applicant.

Further, I would order and direct the judge of the convicting court below to recall its warrant of execution pursuant to Tex.R.App.Pro. 233; to exercise its authority to determine whether applicant is "indigent" within the meaning of Articles 26.04 and 26.05, V.A.C.C.P.; if so, to determine whether "the interests of justice" require that applicant have representation of counsel in a post-conviction habeas corpus proceeding; and, if so, to appoint competent counsel to aid and assist applicant in preparing and filing a petition for such writ of

post-conviction habeas corpus in accordance with Article 11.07 and related provisions in Chapter Eleven, V.A.C.C.P., and to represent applicant in the resultant proceedings under Article 11.07, including proceedings upon return of the writ and accompanying record to this Court.

With available assets at hand this Court and judges of convicting courts must utilize them to ease the current "crisis in capital representation." We should not be reluctant to preserve resort to postconviction remedies on account of some perceived fault in the representative of the party seeking benefits of those remedies.

CLINTON, Judge

DELIVERED: November 22, 1993
EN BANC
PUBLISH

APPENDIX C

INMATE	EXEC. DATE	STATUS	COURT	COUNSEL	Sched. Order
Zimmerman, Keven	11/2/93	Reversed	Supreme Court	Reversed on Direct Appeal with Counsel	No
Jones, Richard	11/2/93	Withdrawn	Trial Court	TRC representing	Yes
Fuller, Aaron	11/3/93	Withdrawn	Trial Court	TRC representing	Yes
Cook, Anthony	11/10/93	Volunteer	NA	Executed on 11/10/93	No
Johnson, Dorsie	11/12/93	Modified to 1/27/94	Trial Court	TRC representing	Yes
Vega, Martin	11/18/93	Modified to 3/18/94	Trial Court	Court Appt'd TRC/recruit	Yes
Lockhart, Micheal	11/23/93	Stayed	Fed. Dist. Ct.	TRC recruited counsel	Yes
Joiner, Orien C.	12/3/93	Modified to 2/4/94	Trial Court	No Counsel	No
Cantu, Domingo	12/8/93	Modified to 5/5/94	Trial Court	Court Appt'd TRC/recruit	No
Rabbani, Syed	12/14/93	Withdrawn	Trial Court	TRC recruited counsel	Yes
Muniz, Pedro	1/5/94	Modified to 4/8/94	Trial Court	Court Appt'd Counsel	Yes
Moreland, James	1/6/94	Withdrawn	Trial Court	Outside counsel agreed to represent	Yes
Jackson, Jimmy	1/18/94	Withdrawn	Trial Court	TRC recruited counsel	Yes
Moreno, Jose	1/19/94	Stayed	Supreme Court	No Counsel	NA
Nelson, Marlin	1/21/94	Withdrawn	Trial Court	No Counsel	No
Fuller, Tyrone	1/25/94	Withdrawn	Trial Court	TRC recruiting counsel	Yes
Draughon, Martin	1/25/94	Withdrawn	Trial Court	TRC recruited counsel	Yes
Green, Ricky Lee	1/25/94	Stayed	Trial Court	Court Appt'd Counsel Filed State Habeas	Yes
Johnson, Dorsie	1/27/94	Stayed	Fed. Dist. Ct.	TRC representing	NA

APPENDIX D

Texas Capital Statistics

I. The following chart shows the number of cases affirmed by the Texas Court of Criminal Appeals by month from 1992 to 1993.

		Month						Thru June 92- 93
		Jan.	Feb.	Mar.	April	May	June	
Year	1992	1	4	3	3	4	3	18
	1993	9	4	3	3	7	8	34
		July	Aug.	Sept.	Oct.	Nov.	Dec.	Total 1992-93
	1992	0	0	4	2	2	5	31
	1993	1	0	13	5	4	2	59

II. The number of inmates assigned to death row each year since 1980.

Year	'80	'81	'82	'83	'84	'85	'86	'87	'88	'89	'90	'91	'92	'93
n	25	25	29	22	23	37	43	20	20	14	14	23	19	36

APPENDIX E

TEXAS LEGISLATIVE SERVICE
5/12/93

ENGROSSED
HB 1562

9-11-234*

RE: Gallego - Writ of habeas corpus for death sentence

A BILL TO BE ENTITLED

AN ACT

relating to procedures for petitioning for a writ of habeas corpus by persons sentenced to death and procedures for the compensation and appointment of counsel to represent persons sentenced to death.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE
OF TEXAS:**

SECTION 1. Chapter 11, Code of Criminal Procedure, is amended by adding Article 11.071 to read as follows:

Art. 11.071. PROCEDURE IN CAPITAL FELONY
CASE

Sec. 1. APPLICATION TO CAPITAL FELONY CASE. Notwithstanding any other provision of this chapter, this article establishes the procedures for a petition for a writ of habeas corpus in which the petitioner seeks relief from a judgment imposing a penalty of death.

Sec. 2. REPRESENTATION BY COUNSEL. (a) A petitioner shall be represented by counsel unless the petitioner has elected to proceed pro se and the convicting trial court finds,

after a hearing on the record, that the petitioner's election is intelligent and voluntary.

(b) Immediately after judgment is entered under Article 42.01 of this code, the convicting court shall determine if the defendant is indigent and desires appointment of counsel for purposes of a writ of habeas corpus. The clerk of the convicting court shall immediately forward to the court of criminal appeals a copy of the judgment, a list containing the name, address, and telephone number of all counsel of record for the petitioner at trial and on direct appeal, and, if the defendant elects to proceed pro se, any findings made by the convicting court on the voluntariness of the defendant's election.

(c) Unless an indigent petitioner is represented by retained counsel, the court of criminal appeals shall appoint counsel at the earliest practicable time under rules adopted by the court.

(d) The court of criminal appeals may not appoint an attorney as counsel under this section if the attorney represented the defendant at trial or on direct appeal, unless:

- (1) the defendant and the attorney request the appointment on the record; and
- (2) the court finds good cause to make the appointment.

(e) If counsel is the same person appointed as counsel on appeal under Article 26.052 of this code, the court of criminal appeals shall appoint a second counsel to assist in the preparation of the appeal and writ of habeas corpus.

(f) An attorney appointed by the court of criminal appeals under this section is compensated as provided by a fee schedule adopted by the court from state funds.

Sec. 3. INVESTIGATION OF GROUNDS FOR PETITION. (a) On appointment, counsel shall investigate

expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of a petition for a writ of habeas corpus.

(b) Not later than the date the petitioner's direct appeal brief is filed, counsel may file an ex parte confidential request for expenses to investigate potential habeas corpus issues with the court of criminal appeals. The court shall consider an initial request filed at a later time only if good cause for the delay is shown.

(c) The request for expenses shall state:

- (1) the claims of the petition to be investigated;
- (2) specific facts that suggest that a claim of possible merit may exist; and
- (3) an itemized list of anticipated expenses for each claim.

(d) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. On presentation by counsel of an accounting of investigative expenses incurred, the court shall order reimbursement of counsel, in an amount not exceeding the amount authorized.

(e) Counsel may incur reasonably necessary expenses for habeas corpus investigation without prior approval by the court of criminal appeals. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for expenses reasonably necessary and reasonably incurred.

Sec. 4. FILING OF PETITION. (a) A petition for writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting trial court not later than the 150th day after the date the appellee's brief is filed on direct appeal to the court of criminal appeals. A petition filed after this date is presumed to be untimely.

(b) A petitioner may file a petition later than the 150th day after the date the appellee's brief is filed on direct appeal to the court of criminal appeals if the petitioner establishes good cause for filing the untimely petition.

(c) A failure to file a petition before the 181st day after the date the appellant's brief is filed on direct appeal constitutes a waiver of all grounds for relief that were available to the petitioner before that date, except as provided by Section 5 of this article.

Sec. 5. SUBSEQUENT OR UNTIMELY PETITION.

(a) If an original petition for a writ of habeas corpus is untimely or if a subsequent petition is filed after filing an original petition, a court may not grant relief based on the subsequent or untimely original petition unless the petition contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely original petition or in a previously considered petition filed under this section because the factual or legal basis for the claim was unavailable:

(A) on the date the petitioner filed the previous petition; or

(B) if the petitioner did not file an original petition, on or before the last date for the timely filing of an original petition;

(2) by clear and convincing evidence, a probability exists that the petitioner is factually innocent of the capital felony for which the petitioner was convicted because of a violation of the United States Constitution or the laws of this state; or

(3) by clear and convincing evidence, in the absence of a violation of the United States Constitution or the

laws of this state, no rational jury could have answered in the state's favor one or more of the special issues that were submitted to the jury in the petitioner's trial under Article 37.071 of this code.

(b) If the convicting court receives a subsequent petition or an untimely original petition, the clerk of the court shall attach a notation that the petition is a subsequent or untimely original petition, assign to the case a file number that is ancillary to that of the conviction being challenged, and immediately send to the court of criminal appeals a copy of the petition, the notation, the order scheduling the petitioner's execution, if scheduled, and any order the judge of the convicting court directs to be attached to the petition.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of this section to allow consideration of the petition have been satisfied. The convicting court may not take further action on the petition before the court of criminal appeals issues an order finding the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the petition as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1) of this section, a legal basis for a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis:

(1) was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date; or

(2) is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court and had not been announced by the court on or before that date.

(e) For purposes of Subsection (a)(1) of this section, a factual basis for a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Sec. 6. ISSUANCE OF WRIT. (a) If an untimely original or subsequent petition found to meet the requirements for consideration under Section 5 of this article or a timely petition for a writ of habeas corpus is filed in the convicting trial court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) The clerk of the convicting court shall make an appropriate notation that a writ of habeas corpus was issued, assign to the case a file number that is ancillary to that of the conviction being challenged, and send a copy of the petition by certified mail, return receipt requested, to the attorney representing the state in that court.

Sec. 7. ANSWER TO PETITION. (a) The state shall file an answer to the petition for a writ of habeas corpus not later than the 30th day after the date the state received the petition. The state may request an extension of time in which to answer the petition by showing particularized justifying circumstances for the extension.

(b) Matters alleged in the petition not admitted by the state are deemed denied.

Sec. 8. FINDINGS OF FACT WITHOUT HEARING.

(a) Not later than the 20th day after the last date the state may answer the petition, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the petitioner's confinement exist and shall issue a written order of the determination.

(b) If the court determines the issues do not exist, the parties may file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested, the court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a) of this section, whichever occurs first.

(d) The clerk of the court shall immediately send to the court of criminal appeals a copy of the petition, answer, orders entered by the convicting court, proposed findings of fact and conclusions of law, and findings of fact and conclusions of law entered by the court.

(e) Failure of the court to issue findings of fact and conclusions of law within the time provided by Subsection (c) of this section constitutes a finding that controverted, previously unresolved factual issues material to the legality of the petitioner's confinement do not exist.

Sec. 9. HEARING. (a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the petitioner's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state may answer the petition, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. The court may require affidavits, depositions, interrogatories, and evidentiary hearings as appropriate.

(b) The convicting court shall allow the petitioner and the state not less than 10 days to prepare for an evidentiary hearing. The parties may waive the preparation time. If the state or the petitioner requests that an evidentiary hearing be

held within 30 days after the date the court ordered the hearing, the hearing shall be held within that period unless the court states, on the record, good cause for delay.

(c) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the petitioner and the attorney representing the state.

(d) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event the judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(e) The Texas Rules of Criminal Evidence apply to an evidentiary hearing held under this section.

(f) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(g) The parties may file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. After argument of counsel, if requested, the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(h) The clerk of the convicting court shall immediately transmit to the court of criminal appeals a copy of the petition, answers and motions filed, court reporter's transcript, exhibits introduced into evidence, proposed findings of fact and conclusions of law, findings of fact and conclusions

of law entered by the court, and any other matters used by the court in resolving issues of fact.

Sec. 10. REVIEW BY COURT OF CRIMINAL APPEALS. The court of criminal appeals shall expeditiously review all petitions for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the petitioner or the state. After reviewing the record, the court shall enter its judgment remanding the petitioner to custody or ordering the petitioner's release, as the law and facts may justify.

Section 2. Chapter 26, Code of Criminal Procedure, is amended by adding Article 26.052 to read as follows:

Art. 26.052. APPOINTMENT OF COUNSEL TO DEFEND CAPITAL FELONY CASE; REIMBURSEMENT OF INVESTIGATIVE EXPENSES. (a) An indigent defendant charged with a capital felony is entitled to be represented by competent counsel at all stages of the criminal proceeding, including writs of habeas corpus. If a county is served by a public defender's office, trial counsel and counsel for direct appeal may be appointed as provided by the guidelines established by the public defender's office. In all other cases, trial counsel and counsel for direct appeal shall be appointed as provided by this article.

(b) A local selection committee is created in each administrative judicial region created under Section 74.042, Government Code. The administrative judge of the judicial region shall appoint the members of the committee. A committee shall have not less than four members, including the administrative judge of the judicial region, at least one district judge, a representative from the local bar association, and at least one practitioner board certified by the State of Texas in criminal law. The committee shall adopt standards for the qualification of attorneys for appointment to capital felony cases. The committee shall prominently post the standards in each

district clerk's office in the region with a list of attorneys qualified for appointment.

(c) The presiding judge of the district court in which a capital felony case is filed shall appoint counsel to represent an indigent defendant as soon as practicable after charges are filed. The judge shall appoint lead trial counsel from the list of attorneys qualified for appointment. The judge shall appoint a second counsel to assist in the defense of a person charged with a capital felony, unless reasons against the appointment appear on the record. Second counsel may be an attorney who is not on the list of attorneys qualified for appointment.

(d) Appointed counsel may file with the trial court a pretrial ex parte confidential request for expenses to investigate potential defenses. The confidential request for expenses shall state:

- (1) the type of investigation to be conducted;
- (2) the specific facts that suggests the investigation will result in admissible evidence; and
- (3) an itemized list of anticipated expenses for each investigation.

(e) The court shall grant the request for expenses in whole or in part if the request is reasonable. On presentation by counsel of an accounting of investigative expenses incurred, the court shall order reimbursement of counsel in an amount not exceeding the amount authorized. If the court denies in whole or in part the request for expenses, the court shall state the reasons for the denial in writing, attach the denial to the confidential request, and submit the request and denial as a sealed exhibit to the record.

(f) If the indigent defendant is convicted of a capital felony and sentenced to death, the defendant is entitled to be represented by competent counsel on appeal.

(g) As soon as practicable after sentence is imposed, the presiding judge of the district court in which a capital felony conviction is returned shall appoint counsel to represent an indigent defendant on appeal.

(h) The court may not appoint an attorney as counsel on appeal if the attorney represented the defendant at trial, unless:

- (1) the defendant and the attorney request the appointment on the record; or
- (2) the court finds good cause to make the appointment.

(i) An attorney appointed under this article to represent a defendant at trial or on direct appeal is compensated as provided by Article 26.05 of this code from state funds.

Section 3. Article 43.14, Code of Criminal Procedure, is amended to read as follows:

Art. 43.14. EXECUTION OF CONVICT. Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than 60 [thirty] days from the day the court sets the execution date, as the court may adjudge, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the institutional division of the Texas Department of Criminal Justice.

SECTION 4. Chapter 43, Code of Criminal of Criminal Procedure, is amended by adding Article 43.141 to read as follows:

Art. 43.141. WITHDRAWAL OR MODIFICATION OF EXECUTION DATE. (a) The convicting court may modify or withdraw the order of the court setting a date for

execution in a death penalty case if the court determines that additional proceedings are necessary on a petition for a writ of habeas corpus filed under Article 11.071 of this code.

(b) No execution date shall be set before the court of criminal appeals enters its judgment on the initial petition for a writ of habeas corpus submitted under Article 11.071 of this code, so long as the petition is timely filed or good cause is shown for its untimely filing. After judgment has been entered, the convicting court may set an execution date pursuant to Article 43.14 of this code. If no petition is filed or good cause is not shown for an untimely petition, an execution date may be set by the convicting court.

(c) If the convicting court withdraws the order of the court setting the execution date, the court shall recall the warrant of execution. If the court modifies the order of the court setting the execution date, the court shall recall the previous warrant of execution, and the clerk of the court shall issue a new warrant.

SECTION 5. The rulemaking authority granted to the court of criminal appeals under Section 22.108, Government Code, is withdrawn with respect to rules of appellate procedure relating to a petition for a writ of habeas corpus by a defendant under a sentence of death, but only to the extent the rules conflict with a procedure under Article 11.071, Code of Criminal Procedure, as added by this Act.

SECTION 6. (a) The change in law made by Article 11.071, Code of Criminal Procedure, as added by this Act, applies only to a capital felony for which a judgment of conviction is entered on or after the effective date of this Act. A capital felony for which a judgment of conviction is entered before the effective date of this Act is covered by the law in effect when the judgment was entered, and the former law is continued in effect for this purpose.

(b) The change in law made by Article 26.052, Code of Criminal Procedure, as added by this Act, applies only to an offense committed on or after the effective date of this Act or to a capital felony for which the court of criminal appeals or a court of the United States has entered an order granting a new trial or a new punishment hearing on or after the effective date of this Act.

(c) For purposes of Subsection (b) of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date. An offense committed or a capital felony for which an order granting a new trial or a new punishment hearing is entered before the effective date of this Act is covered by the law in effect when the offense was committed or the order was entered, and the former law is continued in effect for this purpose.

SECTION 7. This Act takes effect September 1, 1993.

SECTION 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

APPENDIX F

TEXAS
CRIMINAL
DEFENSE
LAWYERS
ASSOCIATION

600 West 13th Street
Austin, Texas 78701/Phone (512) 478-2514
FAX (512) 469-9107

JOHN C. BOSTON
EXECUTIVE DIRECTOR

SUSAN GOGGAN
ATTORNEY/EDITOR

**POLICY STATEMENT OF
TEXAS CRIMINAL DEFENSE LAWYERS
ASSOCIATION**

**ON C.S.H.B. NO. 1562 BY GALLEGO
April 18, 1993**

The purpose of C.S.H.B. No. 1562 is to enact changes in the procedures related to habeas corpus appeals by persons sentenced to death. By prior vote of its Board of Directors, the Texas Criminal Defense Lawyers Association ("T.C.D.L.A.") is opposed to the use of capital punishment as a sanction for crime. Given that capital punishment is the law in Texas, however, the T.C.D.L.A. is vitally interested in the procedures under which the death penalty is applied and capital cases are litigated. Accordingly, the T.C.D.L.A. offers this policy statement in order to clarify its opposition to the majority of the habeas corpus procedures proposed in C.S.H.B. No. 1562 by Representative Gallego.

The defense bar agrees that the present system of post-conviction litigation in capital cases in this state is severely flawed. In order to move cases through the courts in a more orderly, expeditious fashion and to ensure that defendants receive adequate legal representation before they are executed, reform of the current procedures are necessary. While the present system is unacceptable, C.S.H.B. No. 1562 creates far

more problems than it may solve. The bill is designed to promote speed virtually to the exclusion of all other concerns but will not achieve this aim. Many of the proposed procedures place unreasonable burdens upon trial courts and defense attorneys, which would cause serious additional problems and likely result in even lengthier delays in the final disposition of cases.

The T.C.D.L.A. stands ready to work with interested parties in developing realistic procedures to reform capital habeas litigation in Texas. Unfortunately, this bill falls far short of the minimum requirements and legal protections necessary to remedy the present problems. Below is a brief discussion of the nature of habeas corpus proceedings, existing systematic problems, reforms necessary to ensure that cases are expeditiously and fairly resolved, and an analysis of the flaws in the current proposal.

Purpose of Habeas Corpus Proceedings

Habeas corpus proceedings are the legal mechanism provided in the state and federal courts by which an inmate can attack the validity of his or her conviction and sentence. Once a defendant is convicted and sentenced in Texas, the case is automatically appealed to the Court of Criminal Appeals. This appeal is limited to the issues and evidence preserved in the trial record. Following the direct appeal, a death row inmate may seek review of the case by the Supreme Court of the United States through a petition for writ of certiorari. Certiorari is a discretionary remedy, and the inmate's conviction and sentence are deemed final if certiorari is denied. If certiorari is not sought or is denied, an inmate may initiate habeas corpus proceedings.

Only in a habeas corpus proceeding may an inmate present evidence and argument from outside the confines of the trial record. For example, extra-record evidence regarding either illegal suppression of evidence by the prosecution or the constitutionally deficient performance of trial counsel can be

presented only through a habeas corpus appeal. Given the irreversible nature of the death penalty, it is imperative that Texas ensure that inmates have an opportunity to fully litigate such issues before being executed.

The State of Texas requires that indigent death row inmates be provided legal counsel for their trial and direct appeal. Although federal courts are required to appoint and compensate counsel in capital habeas cases, Texas trial courts have discretion whether to appoint counsel in state habeas proceedings -- and rarely do so. However, a death row inmate cannot present habeas claims in federal court without first developing and presenting them in the state courts.

Problems With Present Capital Habeas Procedures

The present system of capital post-conviction litigation in Texas has two fundamental flaws, which in turn generate significant interrelated problems for the orderly administration of justice. First, indigent death row inmates are not ensured legal representation for their state habeas corpus proceedings. Second, execution dates are scheduled randomly by individual trial courts, often with the intent of advancing the litigation in a particular case and always without regard to the number of executions scheduled for the same time period throughout the state. These two defects -- lack of counsel and decentralized scheduling of executions -- consistently render state habeas proceedings chaotic. The frequent consequences are inadequate protection of the constitutional rights of the persons facing execution and unwarranted delay in the resolution of cases. Specific problems engendered by these flaws are:

1. Indigent death row inmates often face execution even though they do not have counsel and have not pursued their state habeas corpus remedies. Five unrepresented men on death row presently have execution dates.

2. Because execution dates are set by trial courts as a mechanism for advancing cases, most inmates have numerous execution dates before they are granted relief or are executed. Substantial time is wasted in litigation surrounding requests for stays of such unnecessary execution dates.
3. The decentralized scheduling of executions and the use of execution dates to advance cases result in the setting of an excessive number of dates: in 1992, 111 execution dates were set and 13 men were executed. Orderly litigation of so many capital cases is impossible, because:
 - a. Courts are given insufficient time to consider post-conviction capital cases carefully and pleadings filed under the threat of an imminent execution date disrupt judicial courts' dockets and opposing parties' schedules; and
 - b. Defense counsel lack sufficient time and resources to present claims and regularly are compelled to file inadequate last-minute pleadings and, as a result, successive petitions.

Minimum Requirements and Legal Protections Necessary to Address Current Problems

As discussed below, C.S.H.B. 1562 proposes a needlessly complicated set of procedures for capital habeas cases. This proposal unfairly restricts the rights of defendants and will create additional chaos and delay in the courts. Below is a brief summary of the minimum changes necessary to create a system in which cases move expeditiously through the courts and the rights of death-sentenced individuals are protected. The basic components of an effective systematic reform include: (1) filing deadlines for state and federal habeas corpus petitions, enforceable by sanctions against counsel, (2) an automatic stay of execution during the first round of habeas proceedings so

long as the applicant meets all filing deadlines, (3) a ban on successive petitions except for limited cases, and (4) appointed and fairly compensated counsel for inmates.

1. There are no filing deadlines for habeas corpus petitions under current law. Deadlines should be established that provide defense counsel a reasonable period of time in which to prepare and file the state and federal habeas petitions. A 180 day deadline for the state habeas petition is sufficient, measured from time of the denial of certiorari or the expiration of time for seeking certiorari on direct review; a 90 day deadline for the federal petition is sufficient, again measured from time of the denial of certiorari or the expiration of time for seeking certiorari on state habeas review.
2. Compliance with filing deadlines should be enforced by meaningful sanctions of the type commonly used by courts: contempt, fines, etc. Judicial use of such sanctions serves to control attorney behavior and litigation practices in all other contexts, and will succeed similarly in death penalty cases. The current practice of using execution dates to move cases must be changed.
3. Individual trial courts around the state presently schedule execution dates. Responsibility for setting execution dates should be centralized in the Court of Criminal Appeals or the Governor's Office. Execution dates should not be set during the initial round of habeas corpus proceedings so long as the applicant meets all applicable filing deadlines.
4. Nothing in present law bars an inmate from filing more than one state habeas petition. Successive petitions should be banned except in limited circumstances. A successive petition should be permitted only when an applicant can show that it presents a claim not previously adjudicated and (a) the claim was not discoverable

through the exercise of due diligence at the time of the prior petition, or (b) the claim is based on law not recognized by the state or federal courts at the time of the prior petition, or (c) the court concludes that, but for the violation of which the applicant complains, there is a reasonable probability that he or she would not have been convicted or sentenced to death, or (d) the claim should be considered to avoid a fundamental miscarriage of justice.

5. Defense counsel for state habeas proceedings must be appointed and fairly compensated. Compensation levels should reflect the complexity and demands of capital litigation. Counsel should be provided funds through the courts for necessary investigation and the assistance of experts.

Reasons for T.C.D.L.A. Opposition to C.S.H.B. 1562

C.S.H.B. No. 1562 is not a well-reasoned response to the fundamental flaws affecting the current system of litigating capital habeas cases. The bill places unreasonable burdens upon trial courts and defense attorneys and simply substitutes a new set of systemic problems for the current flawed procedures. The proposed procedures will themselves be vulnerable to attack and, consequently, will likely result in even lengthier delays in the final resolution of cases.

The T.C.D.L.A. strongly supports one change proposed in C.S.H.B. (Art. 11.071, Sec. 2): legal counsel should be appointed and compensated for state habeas corpus proceedings by the Court of Criminal Appeals. Beyond this provision, however, the bill is essentially unacceptable to the defense bar. The primary flaws of C.S.H.B. 1562 are summarized below.

1. The proposed unitary system, whereby habeas corpus proceedings are commenced before the direct appeal is decided, is inefficient and wastes funds.

The bill creates a unitary scheme (Art. 11.071, Sec. 4) whereby the direct appeal briefing and habeas corpus investigation occur simultaneously, and the habeas petition must be filed before the Court of Criminal Appeals renders its decision on the direct appeal. The T.C.D.L.A. is unequivocally opposed to this proposed unitary system, because it is inefficient, unrealistic, and needlessly complicated. In addition, the proposed system may be unconstitutional because it attempts to combine two distinct constitutional guarantees. The Court will be forced to evaluate habeas applications and records from evidentiary hearings held on those applications even when cases will eventually be reversed on direct appeal -- which occurs in at least 13% of capital appeals. In those instances, habeas counsel will have to be compensated for their considerable time and expenses even though their work was wholly unnecessary.

In many cases the direct appeal decision clarifies the legal issues and dictates whether those issues will be presented or not in a subsequent habeas application. This opportunity for legal development of issues will be lost, and may require the Court to evaluate needlessly duplicative issues.

2. The proposed judicial timetables are unnecessarily restrictive and may raise a separation of powers problem.

The bill (Art. 11.071, Sec. 8 and Sec. 9) proposes legislatively-imposed deadlines on virtually every aspect of a trial court's treatment of a capital habeas case. This approach suggests that courts cannot be trusted to make appropriate decisions about how to handle cases or their dockets, and may well be offensive to the Texas judiciary. Realistically, different cases present different demands on the judiciary. The T.C.D.L.A. presumes that state courts do the best they can, attempting to reach

results as expeditiously as justice permits. The time periods provided are far too short and too restrictive.

3. The bill's treatment of execution date scheduling will perpetuate last-minute litigation and stays.

The bill does not address the current problems that arise from frequent execution orders and the pursuit of stays -- from either the state or federal courts. At most, it (Art. 43.141) establishes discretion in the trial court to withdraw or modify an execution order. That section does not obligate the court to do so, even if a federal court transmits a "written request" -- for which, it should be noted, federal law makes no provision whatsoever. The bill also allows a trial court to modify an execution date for as little as ten days hence.

The bill clearly contemplates that execution dates will continue to be set regularly for inmates during their first round of habeas corpus proceedings, and certainly before their petitions are filed in federal court. As discussed above, this practice is not necessary to move cases, and causes many of the serious problems affecting the current system.

Filing deadlines, rather than execution dates, should be used to move litigation. Sensible stay provisions should be tied to the pendency of legal proceedings rather than to a fixed number of days.

4. The bill will increase constitutional litigation in the federal courts because it does not provide a reasonable opportunity to present a claim of ineffective assistance of counsel on appeal under the Sixth Amendment.

The bill (Art. 11.071, Sec. 2) establishes a presumption in favor of appointing as one of two habeas counsel the same individual who was counsel on the direct appeal.

Criminal defendants have a Sixth Amendment right to counsel at trial and on direct appeal. Accordingly, a constitutional ground for relief on state or federal habeas could be ineffectiveness of appellate counsel. However, appointing the same attorney on appeal and habeas prevents raising such a claim, even when a second attorney is also appointed on the habeas. The conflict of interest is obvious and irresolvable.

Nor can such a claim realistically be raised in a successive petition, since there is no provision in the bill for new, compensated counsel for a second round of habeas appeals. Consequently, the inmate will never be represented by counsel who does not labor under a conflict of interest that prevents raising a claim of ineffective assistance of appellate counsel.

5. The proposed time period for filing the initial habeas petition is too short.

As stated above, the T.C.D.L.A. is opposed to the bill's unitary system. The bill (Art. 11.071, Sec. 4) proposes that the initial habeas petition is due 90 days after the appeal brief is filed. 90 days is insufficient time to prepare and file a competent state habeas petition. The bill requires that the habeas investigation be undertaken before the appeal brief is completed. Where the appellate attorney is also one of the two habeas attorneys, it is unreasonable to assume that the appellate attorney will be participating in preparing the habeas petition at the same time he or she is completing the appeal brief. It is also unreasonable to assume that the appellate attorney will be able to prepare a habeas petition immediately after the appeal brief is filed.

Capital cases are extremely complex and time-consuming. The demands of most legal practices will prevent attorneys from spending all of their time on a

single case for months on end -- which is the only possible way the proposed scheme could work. If the habeas attorney is not the appellate attorney, he or she will require more than 90 days to complete the habeas petition in light of the issues raised in the appeal brief.

6. The proposed rule on successive petitions is overly restrictive.

As stated above, the T.C.D.L.A. supports reasonable limits on an inmate's ability to file successive petitions. However, this bill (Art. 11.071, Sec. 5) proposes an inappropriately restrictive approach to successive petitions. A comparison of the bill's provisions with those in current federal law cannot be accomplished briefly, but further discussion of the proper circumstances under which successive petitions should be considered is clearly necessary.

Conclusion

T.C.D.L.A. agrees that the present system of capital habeas litigation in Texas is severely flawed. In order to move cases through the courts in an expeditious manner and to ensure that the constitutional rights of defendants are protected before they are executed, reform of the current procedures is necessary. **Unfortunately**, C.S.H.B. No. 1562 creates far more problems than it may solve. The bill aims to promote the speedy disposition of cases, but will not achieve this goal. Many of the proposed procedures place unreasonable burdens upon trial courts and defense attorneys, which would cause serious additional problems and likely result in even lengthier delays.

The T.C.D.L.A. strongly supports one premise of C.S.H.B. (Art. 11.071, Sec. 2): legal counsel should be appointed and compensated for state habeas corpus proceedings by the Court of Criminal Appeals. Beyond this provision, however, the organized criminal defense bar is opposed to the

bill. Its provisions fail to provide the minimum requirements and legal protections necessary to constitutionally remedy the systemic problems in current capital habeas procedures.

John Boston, Executive Director, Texas Criminal Defense Lawyers Association

Richard Anderson, Texas Criminal Defense Lawyers Association (Board of Directors, President 1991-1992); Member, State Bar Committee on Legal Representation for those on Death Row

David Botsford, Texas Criminal Defense Lawyers Association (Secretary-Treasurer, Board of Directors)

Carlton McLarty, Chairman, Texas Criminal Defense Lawyers Association Committee on Death Row Representation

The preceding policy statement is also endorsed by the individuals and organizations noted below, with the following additional comment:

We agree that indigent death row inmates must have access to appointed and fairly compensated legal counsel for state habeas corpus proceedings. Providing such counsel will help to speed up the disposition of cases, create a more orderly litigation process, and ensure the protection of defendants' constitutional rights. Accordingly, we join with T.C.D.L.A. in supporting the provisions in C.S.H.B. 1562 that mandate appointment of counsel.

The vast majority of habeas reform proposals on the federal level and in other states have recognized the need for established qualification standards for counsel. Unlike the T.C.D.L.A., we also believe that standards for appointing counsel are necessary. The bill (Art. 11.071, Sec. 2) is

insufficient in this regard, as it provides that the Court of Criminal Appeals act alone to appoint habeas corpus counsel. Instead, the Court should appoint a committee of individuals with experience in the defense side of capital habeas cases from across the state. That committee should be responsible for developing standards for counsel and maintaining a list of qualified attorneys in different areas. The Court could then appoint habeas counsel from the list of qualified attorneys.

Richard Burr, Director, Legal Defense Fund Death Penalty Project

Professor David R. Dow, University of Houston Law School

Eden Harrington, Executive Director, Texas Appellate Practice and Education Resource Center

APPENDIX G

COMMITTEE ON CRIMINAL JURISPRUDENCE

April 14, 1993

Room E2.016

8:15 a.m.

Pursuant to a public notice posted on April 7, 1993, the Committee on Criminal Jurisprudence met in a public hearing and was called to order by the Chair, Representative Allen Place.

Present: Representatives Place, Hartnett, Combs, De la Garza, Granoff, Greenberg, Nieto, Solis, Stiles, and Talton (10).

Absent: Allen (1)

A quorum was present.

S.B. 13 and H.B. 1606

The Chair laid out S.B. 13 and H.B. 1606 and recognized the authors, Senator Brown and Representative Combs to explain the bills.

The Chair recognized the following witnesses who testified in favor of the bill:

Vernon Gaston, representing the City of Garland;
Knox Fitzpatrick, representing John Vance, Criminal District Attorney, Dallas County.
Theresa Jeffers, representing herself;
Mark Clark, representing CLEAT;
Melissa Nelson, representing Justice for Children; and
S. C. Van Vleck, representing the Fort Worth Police Department.

The Chair recognized the following persons who testified on the bill:

Steve Hopson, representing the Texas Department of Public Safety (DPS); and
Susan Watkins, representing the Texas Department of Protective and Regulatory Services.

The Chair recognized the following persons who testified against the bills:

Ron Goranson, representing the Texas Criminal Defense Lawyers Association (TCDLA), and
John Boston, representing TCDLA

H.B. 798 and H.B. 1562

The Chair laid out H.B. 798 and H.B. 1562 and recognized the author, Rep. Gallego, to explain the bills.

The Chair recognized Attorney General Dan Morales to discuss the bills.

The Chair recognized the following witnesses to who testified in favor of the bills:

Sue Keys, representing herself;
Dennis Keys, representing himself; and
State District Judge Caprice Casper, representing herself.

The Chair recognized the following witnesses who testified against H.B. 1562:

Richard Burr, representing the NAACP Legal Defense to Educational Fund, Inc.

The Chair moved that the committee recess until 2 p.m. or upon adjournment. There being no objection, the committee recessed at 9:58 a.m.

The Committee reconvened at 6:40 p.m. in Room E2.026 and was called to order by the Chair, Representative Allen Place.

Present: Representatives Place, Hartnett, Allen, Combs, De la Garza, Nieto, Solis, Talton (8).

Absent: Representatives Granoff, Greenberg, Stiles (3).

A quorum was present.

H.B. 1562

The Chair laid out H.B. 1562. The Chair laid out a substitute for H.B. 1562.

The Chair recognized the following witnesses to testify on the bill:

Robert Walt, representing the Office of the Attorney general of Texas; and
Peggy Griffey, representing the Office of the Attorney General of Texas.

The Chair recognized the following witness to testify on the substitute:

John Boston, representing the TCDLA.

The Chair withdrew the substitute and moved that H.B. 1562 be referred to the Capital Punishment Subcommittee. There being no objection, the motion passed.

S.B. 13 and H.B. 1606

The Chair laid out S.B. 13 and H.B. 1606.

The Chair recognized the following witness who testified against the bills:

Levering Reynolds, III, representing himself, and the Texas Conference of Churches.

The Chair moved to send S.B. 13 and H.B. 1606 to the Capital Punishment Subcommittee. There being no objection, the motion was adopted.

H.B. 798

The Chair laid out H.B. 798. Rep. Combs moved to report H.B. 798 to the full house with the recommendation that it do pass. The motion prevailed by the following record vote:

Ayes: Place, Allen, Combs, De la Garza, Nieto, Solis, Talton (7).

Nays: None (0).

PNV: None (0).

Absent: Hartnett, Granoff, Greenberg, Stiles (4).

The following persons registered in favor of H.B. 1606 but did not testify:

Jan Hurley, representing Justice for Children;
Rita Nations, representing Justice for Children; and
Pat Gilmore, representing Justice for Children.

The following persons registered in favor of S.B. 13 but did not testify:

Diane Lynn Taylor, representing herself, and
Robert G. Carreiro, representing himself.

The following persons registered in favor of S.B. 13 and H.B. 1606:

Linda Kelley, representing herself and her murdered children, Mark and Kara; and Harriett Semander, representing herself.

The following persons registered on H.B. 1606:

Kathy J. Campbell, representing the Texas Department of Protective Regulatory Services.

The following person registered on S.B. 13 and H.B. 1606:

Shannon Noble, representing the Texas Women's Political Caucus; and

The following person registered for S.B. 13, H.B. 798 and H.B. 1606:

Madonna Petrucha, representing herself, and
Angela Cieslewicz, representing Parents of Murdered Children.

The following person registered for H.B. 798:

Aaron W. Northrup, representing himself.

The following persons registered in favor of H.B. 1562 but did not testify:

Patsy M. Teer, representing herself,
Wayne Strickler, representing himself,

Roe Wilson, representing the Harris County District Attorney's office. (A statement was entered into the record).

Aaron W. Northrup, representing himself;

Linda Kelley, representing herself;

Harriett Semander, representing herself;

Shirley Parish, representing herself, her husband, and her daughter, victim Kimberly Ann Strickler;

Karen Phillips, representing Justice for Children; and

Frank Phillips, representing Justice for Children.

The following persons registered on H.B. 1562 but did not testify:

David R. Dow, representing himself.

The following person registered against H.b. 1562 but did not testify:

Eden Harrington, representing the Texas Resource Center.

The following persons registered against H.B. 1562, S.B. 13, and H.B. 1606:

David Botsford, representing TCDLA; and
Edward F. Sherman, representing himself.

A statement was entered into the record from Robert L. Stearns, representing VIGIL.

Rep. Combs moved that the clerk correct the minutes from the March 1, 1993 Committee Hearing to show that House Bills 599, 602 and 77 were sent to the Sexual Assault Subcommittee, and correct the minutes from the February 22, 1993 Committee Hearing to show that H.B. 111 was sent to the Procedural Subcommittee. There being no objection, the motion passed.

Rep. Combs moved that the Committee adjourn. There being no objection, the Committee adjourned at 8:00 p.m.

Allen Place, Chair

Arlene E. Zirkel, Clerk

APPENDIX H

STATE of TEXAS HOUSE of REPRESENTATIVES

P.O. BOX 777
ALPINE, TEXAS 79831
(915) 837-7383

P.O. BOX 420663
DEL RIO, TEXAS 78842-0663
(210) 774-0800

Pete P. Gallego

District 74
P.O. BOX 2910
Austin, Texas 78768-2910
(512) 463-0566

FOR IMMEDIATE RELEASE
TUESDAY, FEBRUARY 8, 1994

CONTACT: PETE GALLEGGO @ 512 463-0566

GALLEGO WILL TRY AGAIN TO ELIMINATE UNWARRANTED DELAYS IN CAPITAL MURDER CASES

Austin - Texas State Representative Pete Gallego, D-Alpine, announced on Monday that he will re-file legislation during the 1995 session of the Texas Legislature to eliminate needless and seemingly endless delays in the appeal of capital convictions. The legislation was approved by the House of Representatives but failed to pass the Senate during the final hours of the 1993 legislative session.

Gallego credited the office of **Attorney General Dan Morales** for assisting in drafting the legislation and took opponents of the legislation to task. "Unfortunately, a good piece of legislation was killed due to intense lobbying by the Texas Criminal Defense Lawyers Association and the Texas Resource Center, which defends criminals convicted of capital murder," Gallego said.

The legislation will expedite review of both capital convictions and sentences by amending the state procedure used to review capital cases. The procedure is known as "habeas review." The bill would also provide for the appointment and compensation of defense counsel to

represent inmates on death row. It would also allow defense attorneys adequate time to litigate claims raised by inmates without being under the shadow of a pending execution date.

"Recently, allegations have been made that there is a crisis in death-row representation. The people making these allegations are the same people who killed this legislation in the Senate last session," Gallego said. "This legislation would have, and still will, resolve those problems. We can provide fair death-row representation and at the same time impose time limits and order on the state habeas review process."

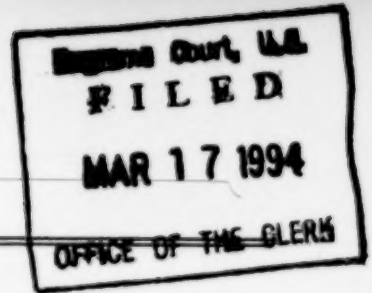
Gallego's bill will limit an inmate under a sentence of death to one round of state habeas review and, with limited exceptions, require the inmate to raise all grounds of appeal in one application for habeas review. The bill also provides adequate timetables for the filing of the initial state habeas application and provides for qualified counsel to be appointed to represent the inmate immediately upon conviction.

If the United States Congress revives its proposed federal habeas reform, Gallego said state reform is imperative. In Texas, the habeas review process is initiated by the scheduling of an execution date. And, as Texas law does not currently provide for the appointment of counsel in state habeas review and does not require state habeas petitions to be filed within specific time periods, Texas would not be in compliance with proposed federal changes. Gallego stated, "That would bring executions and pending death penalty appeals to a complete standstill."

Gallego also voiced concern for the families and friends of victims of violent crime. "Our current system is an emotional roller-coaster for the families of victims, and an unnecessarily high financial burden on the State of Texas and its taxpayers," Gallego stated. "The purpose of the

legislation is to provide some stability to our system and eliminate excessive and unnecessary costs while at the same time assuring that death-row inmates have a fair and meaningful review of their cases."

(10)
No. 93-6497



In The
Supreme Court of the United States
October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S BRIEF IN REPLY

*MANDY WELCH
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
fax (713) 522-2733

DOUGLAS G. ROBINSON
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7800
fax (202) 393-5760

*Counsel of Record

QUESTION PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651(a), in order to appoint counsel for an indigent *pro se* death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
I. FEDERAL DISTRICT COURTS HAVE AUTHORITY TO ISSUE STAYS TO PROVIDE SUFFICIENT TIME FOR COUNSEL TO BE APPOINTED AND TO PREPARE A HABEAS PETITION.....	2
A. If a district court has jurisdiction to order the appointment of counsel prior to the filing of the habeas petition, it also has sufficient jurisdiction to stay an execution prior to the filing of the petition.	3
(1) The district courts have authority to issue § 2251 stays in order to appoint counsel and provide sufficient time for counsel to prepare and file a proper habeas petition	3
(2) Under the circumstances of this case, the district court had jurisdiction to issue a stay of execution in aid of its jurisdiction to appoint counsel under 21 U.S.C. § 848(q)(4)(B) and to effectuate and protect such an appointment under 28 U.S.C. § 1651.....	6
B. Even if a § 848 motion does not invoke the court's habeas corpus or federal question jurisdiction and thereby permit the court to issue a stay, the All Writs Act permits the court to issue a stay to preserve its prospective jurisdiction over the habeas petition to be filed by appointed counsel	7

TABLE OF CONTENTS – Continued

	Page
C. The Canon of <i>Inclusio Unius Est Exclusio Alterius</i> Does Not Apply	13
II. BY CREATING A PRE-FILING RIGHT TO FEDERAL HABEAS COUNSEL, CONGRESS INTENDED TO EMPOWER THE FEDERAL COURTS TO GRANT PRE-FILING STAYS OF EXECUTION, AND RESPONDENT'S ARGUMENT MISREADS CONGRESSIONAL INTENT	15
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Amalgamated Clothing Workers v. Richman Brothers, 348 U.S. 511 (1955).....	7, 8, 9, 12
Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970).....	9
Autry v. Estelle, 464 U.S. 1 (1983).....	15
Barefoot v. Estelle, 463 U.S. 880 (1983).....	15
Barnard v. Collins, 13 F.3d 871 (5th Cir. 1994).....	3
Bell v. Lynaugh, 488 U.S. 905 (1988).....	15
Brown v. Allen, 344 U.S. 443 (1953).....	11
Ex Parte Green, 548 S.W.2d 914 (Tex. Crim. App. 1977).....	17
FTC v. Dean Foods Co., 384 U.S. 597 (1966).....	12, 20
Gosch v. Collins, 8 F.3d 20 (5th Cir. 1993).....	18
Herman & MacLean v. Huddleston, 459 U.S. 375 (1983).....	13
Hill v. Martin, 296 U.S. 393 (1935).....	5
Laws v. Delo, 491 U.S. 913 (1989).....	15
Mallard v. U.S. District Court, 490 U.S. 296 (1989).....	7
Mitchum v. Foster, 407 U.S. 225 (1972).....	5
Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985).....	13, 14
Preiser v. Rodriguez, 411 U.S. 475 (1973).....	5, 6
Sumner v. Mata, 449 U.S. 539 (1981).....	10
United States v. New York Telephone Co., 434 U.S. 159 (1977).....	6, 7

TABLE OF AUTHORITIES – Continued

Page

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977).....	<i>passim</i>
Washington v. Texas, 113 S.Ct. 2388 (1993).....	16
Woodward v. Hutchins, 464 U.S. 377 (1984).....	15
Wright v. West, 112 S. Ct. 2482 (1992).....	10

STATUTES

21 U.S.C. § 848(q).....	<i>passim</i>
28 U.S.C. § 1331.....	5
28 U.S.C. § 1651.....	6, 9, 15
28 U.S.C. § 2101(f).....	14, 15
28 U.S.C. § 2201.....	5, 6
28 U.S.C. § 2241.....	10
28 U.S.C. § 2251.....	<i>passim</i>
28 U.S.C. § 2283.....	2
42 U.S.C. § 1983.....	5, 6

MISCELLANEOUS

Michael G. Collins, The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings, 66 N.C.L. Rev. 49 (1987).....	12
17 Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE, § 4224 at 525-526 (1978).....	10

INTRODUCTION

This Court must determine whether a federal habeas court has jurisdiction to stay an execution of a state death sentence in order to effectuate the statutory right to counsel provided by Congress in 21 U.S.C. § 848(q)(4)(B). The parties agree that 28 U.S.C. § 2251 empowers a federal district judge "before whom a habeas corpus proceeding is pending" to stay an execution "for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251. They disagree, however, about the circumstances which permit resort to § 2251.

Respondent relies primarily on three arguments. First, Respondent asserts that a district court's only source of authority to grant a stay is 28 U.S.C. § 2251. Notwithstanding Congress' enactment of § 848(q)(4)(B), which guarantees counsel "[i]n any post-conviction proceeding under [28 U.S.C.] Section 2254," Respondent insists that a "habeas corpus proceeding," as used in § 2251, is not commenced until a formal and legally sufficient habeas corpus petition is filed with or without counsel. RB at 7-27. In other words, even if the district court had authority to appoint counsel for Mr. McFarland before the filing of a formal petition, it had no power to stay his execution under § 2251 for the purpose of doing so, or of providing counsel with sufficient time to discharge her duties. *Id.*

Second, Respondent argues that § 848(q)(4)(B) cannot be considered an express exception to the Anti-Injunction Act. RB at 18-22. To support this argument, Respondent denigrates the § 848 entitlement as a mere "procedural rule applicable only to federal proceedings," unenforceable in a habeas proceeding or any other action. RB at 18. Additionally, Respondent denies the existence of any circumstances under which a stay of execution would be necessary in order to effectuate the clear intent of § 848(q) that all indigent prisoners seeking to vacate or set aside a death sentence shall have the assistance of counsel in presenting their claims in § 2254 proceedings.

Respondent's third argument attempts to justify the anomalous intent imputed to Congress by its first two. According to Respondent, there is nothing inconsistent with Congress, on the one hand, *requiring* the federal district court to appoint counsel to represent a petitioner in connection with the preparation and filing of a habeas petition, while *forbidding* that court from granting a stay in order to do so. Respondent maintains that if the federal right to counsel is lost – by the prisoner's execution – it must be because the prisoner waited too late to assert it.¹

Mr. McFarland addresses these mistaken contentions in turn.

I. FEDERAL DISTRICT COURTS HAVE AUTHORITY TO ISSUE STAYS TO PROVIDE SUFFICIENT TIME FOR COUNSEL TO BE APPOINTED AND TO PREPARE A HABEAS PETITION.

Respondent argues that the Anti-Injunction Act, 28 U.S.C. § 2283, which restricts the ability of a federal court to enjoin state court proceedings, precludes a federal habeas court from staying an execution in order to appoint or provide counsel sufficient time to prepare and file a proper petition unless a formal and legally sufficient habeas petition has already been filed. The parties agree, however, that the Act excepts injunctions that are (1) expressly authorized by federal law; (2) "in aid of" the respective court's jurisdiction; or (3) necessary to protect or effectuate a federal court's judgment. As demonstrated in Mr. McFarland's opening brief, the first two exceptions permit a federal district court to stay an execution before the filing of a habeas petition when the stay is necessary to effectuate the statutory right to counsel.

¹ In Respondent's view, "[t]he effectiveness of [§ 848(q)(4)(B) does] not depend on a federal habeas court's ability to stay an execution, [but on] a petitioner's timely request for appointment." RB at 16.

A. If a district court has jurisdiction to order the appointment of counsel prior to the filing of the habeas petition, it also has sufficient jurisdiction to stay an execution prior to the filing of the petition.

When it enacted 21 U.S.C. § 848(q)(4)(B), Congress guaranteed counsel to indigent prisoners "[i]n any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence. . . ." *Id.* There is no dispute between the parties that Congress thereby intended to afford counsel to prisoners to provide expertise in investigating, researching, drafting and presenting available claims for relief.² It necessarily follows, as *Amicus* CJLF acknowledges, that § 848(q)(4)(B) authorizes the appointment of counsel before the filing of a formal and legally sufficient habeas petition.

If Mr. McFarland and Respondent's supporting *amicus* CJLF are correct in this regard, it logically follows that a federal district court also has jurisdiction, under several theories, to stay an execution when necessary to protect the federal statutory right to the assistance of counsel.

(1) The district courts have authority to issue § 2251 stays in order to appoint counsel and provide sufficient time for counsel to prepare and file a proper habeas petition.

If the filing of a formal request for habeas counsel empowers a federal district court to appoint counsel

² Respondent concedes, "arguendo," that an indigent death row prisoner who seeks to vacate or set aside a death sentence under § 2254 is entitled to the appointment of § 848 counsel before the filing of a habeas petition. RB at 16. *Amicus Curiae*, Criminal Justice Legal Foundation (hereafter CJLF), explicitly acknowledges that the § 848(q)(4)(B) right to attaches before the filing of a formal habeas petition. CJLF Brief at 12, 22-23. See also *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994) (holding that the Section 848(q)(4)(B) right to counsel is mandatory).

under § 848(q)(4)(B), it should be considered the initiation of a "habeas proceeding" thereby triggering the stay provisions of § 2251. To conclude otherwise would create an artificial distinction between a "post-conviction proceeding under § 2254," 21 U.S.C. § 848(q)(4)(B), and a "habeas proceeding" which triggers the power to stay an execution under § 2251. In the absence of clear Congressional intent to the contrary such a strained construction is inappropriate and unnecessary. It would also vitiate the clear purpose of § 848 to insure that all indigent capital habeas petitioners have the benefit of counsel at all stages of the habeas corpus process, including the investigation of claims and preparation of the habeas petition.

When a habeas proceeding has thus commenced, the district court should be authorized under § 2251 to stay an execution whenever necessary to effectuate the prepetition right to counsel. Respondent's interpretation of "habeas proceeding" disregards the potential consequences for the counsel provisions under § 848(q)(4)(B) when a state schedules an execution before federal habeas counsel has been appointed and given sufficient time to prepare and file a proper habeas petition.

Respondent correctly observes that the right to counsel under 21 U.S.C. § 848(q)(4)(B) is a federal entitlement different from the underlying constitutional rights that are enforceable in a federal habeas action. However, Respondent then inexplicably concludes that the right is therefore not enforceable in a federal habeas proceeding. Respondent thus suggests that Congress enacted a statutory entitlement to appointed counsel for all indigents seeking relief in capital habeas proceedings but intended that it not be enforceable. To construe the provision in this way clearly defeats its purpose.

Other, more reasonable interpretations would further Congress' goal of providing counsel in capital federal habeas corpus proceedings. The most reasonable interpretation, and the one most likely intended by Congress, is that a "proceeding" to invoke and enforce the right to habeas counsel is ancillary to and inseparable from the

federal habeas proceeding.³ Under that construction, as discussed above, the commencement of a proceeding seeking counsel also commences a "habeas proceeding" and triggers the § 2251 habeas stay provisions.

Except for the integral relationship between the right to habeas counsel and the right to challenge the constitutionality to prisoner's confinement and sentence in a § 2254 habeas proceeding, a motion for appointment of counsel and a stay of execution to protect the right to counsel under § 848 (q)(4)(B) could be construed as an action under 28 U.S.C. §§ 2201 and 1983 to enforce a federal right against encroachment by state action.⁴ Such a proceeding could be brought under the court's general federal question jurisdiction. *See* 28 U.S.C. § 1331. While Mr. McFarland did not style his pleading a "complaint" nor explicitly invoke the court's jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, his motion pled facts which could theoretically constitute a cause of action under these statutes, and his request for a stay was tantamount to a request for a temporary injunction.

Since a proceeding seeking appointment of habeas counsel and a stay in connection therewith is brought in order to challenge a criminal conviction and sentence, under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), it probably

³ In *Hill v. Martin*, 296 U.S. 393, 403 (1935), Justice Brandeis defined "proceedings" as it is used in the Anti-Injunction Act as follows: "It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. . . . It applies alike to actions by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."

⁴ The Court has held that injunctions issued under 42 U.S.C. § 1983 meet the "expressly authorized" exception to the Anti-Injunction Act. *See Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972).

must be construed as a habeas corpus proceeding.⁵ The commencement of such a proceeding therefore must also be considered the commencement of a "habeas proceeding."⁶

- (2) Under the circumstances of this case, the district court had jurisdiction to issue a stay of execution in aid of its jurisdiction to appoint counsel under 21 U.S.C. § 848(q)(4)(B) and to effectuate and protect such an appointment order under 28 U.S.C. § 1651.

The All Writs Act, 28 U.S.C. § 1651, authorizes federal courts to grant stays or enter other orders "in aid of their respective jurisdictions" or to issue orders "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." RB at 23 (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977) (emphasis supplied)). As we have shown, *supra*, the filing of a motion for appointment of counsel under 21 U.S.C. § 848(q)(4)(B) invokes either the court's habeas corpus jurisdiction or its general federal question jurisdiction. Thus, even if the Court determines that § 2251 requires that a formal, legally sufficient habeas petition be filed before a stay may issue, upon the filing of a formal request for counsel, the court has jurisdiction to enter an order appointing counsel. At that point, the All

⁵ In *Preiser*, the Court broadly held that habeas corpus is the exclusive remedy for a state prisoner seeking to challenge the fact or duration of his confinement.

⁶ Congress plainly intended for an indigent death row prisoner to have some means to enforce his rights under § 848(q)(4)(B). Under Respondent's theory the right cannot be enforced in a § 2254 proceeding and thus it must be treated as independent of the habeas corpus proceeding. In that event, it must be a proper subject for a § 1983 action seeking a temporary injunction to protect and enforce the right to counsel.

Writs Act authorizes a stay "in aid of [the court's] jurisdiction" and "to effectuate and prevent the frustration of" its order appointing counsel. *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). Cf. *Mallard v. U.S. District Court*, 490 U.S. 296, 309 (1989) (holding that if otherwise authorized, the appointment of counsel is an exercise of "jurisdiction").

- B. Even if a § 848 motion does not invoke the court's habeas corpus or federal question jurisdiction and thereby permit the court to issue a stay, the All Writs Act permits the court to issue a stay to preserve its prospective jurisdiction over the habeas petition to be filed by appointed counsel.

If § 848(q)(4)(B) permits the appointment of counsel prior to the filing of a habeas petition, the district court has jurisdiction to stay a pending execution. See Point I(A) *supra*. However, if the court rejects a reading of § 848 which confers jurisdiction to issue a stay, the All Writs Act still provides ample authority for the district court to stay an execution to appoint counsel. Such a temporary stay could be entered "in aid of" the court's jurisdiction to entertain the habeas petition that is subsequently filed. The Anti-Injunction Act would not prevent such a stay because that Act's second exception is co-extensive with the All Writs Act.⁷

Respondent and *amicus* CJLF rely heavily on two decisions of this Court to support their argument concerning the scope of the second exception to the Anti-Injunction Act and the All Writs Act. RB at 9, 25 (citing *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 519 n.5 (1955), and *Vendo Co. v. Lektro-Vend*

⁷ The legislative history of the Anti-Injunction Act and the parallel language of the All Writs Act and second exception to the Anti-Injunction Act demonstrate that the two statutory provisions are *in pari materia* and must be interpreted similarly. See PB at 47-49.

Corp., 433 U.S. 623, 642 (1977) (plurality opinion)). However, neither *Clothing Workers* nor *Vendo Co.* will bear such weight.

In *Clothing Workers*, a private party in a labor dispute sought a federal district court injunction of state court proceedings, alleging that the state court was infringing on the National Labor Relations Board's exclusive jurisdiction over such matters. The district court and court of appeals denied the injunction, and this Court affirmed the denial for numerous reasons, all of which distinguish *Clothing Workers* from Mr. McFarland's case.

Under applicable federal law, the National Labor Relations Board, and not a private party, was authorized to seek interim relief from a district court pending final adjudication of a labor complaint by the Board. In other words, the person seeking the injunction did not have authority to invoke such relief from the court. At the time the injunction was sought from the district court, no complaint had been filed before the Board regarding the labor dispute at issue. Furthermore, the federal court of appeals, not the district court, had appellate jurisdiction over NLRB decisions. The district court did not have present or potential jurisdiction over the labor dispute at issue. Accordingly, the Court held that the federal district court was without authority under the Anti-Injunction Act – and, by implication, under the All Writs Act – to stay the pending state court proceedings because it possessed no prospective jurisdiction over the labor dispute. 348 U.S. at 519.

In *dictum* in a footnote, 348 U.S. at 519 n.5, the Court questions whether authority under the All Writs Act to issue an injunction in aid of prospective jurisdiction should extend beyond inferior and superior courts of the same judicial systems.⁸

⁸ Footnote 5 of *Clothing Workers* reads:

We have been referred by petitioner to decisions in the lower federal courts under 28 U.S.C.

Finally, the Court also notes that, as a general matter, a federal injunction to prevent state courts from exercising jurisdiction over a subject matter pre-empted by federal law is inappropriate under the Anti-Injunction Act, because state courts can be trusted to enforce superior federal rights under the Supremacy Clause. *See id.* at 518 (if federal law pre-empts state law, presumably state courts will so hold).⁹

The rationale of *Amalgamated Clothing Workers* is simply inapplicable in the federal habeas context. Federal

§ 1651 . . . and its antecedents holding that the Court of Appeals may resort to writ of mandamus or prohibition 'in aid of its jurisdiction' to prevent a district court from acting in a manner that would defeat the Court of Appeals' power of review. These decisions might be more relevant had the injunction been sought from the Court of Appeals. Only that court has the power to review decisions of the [NLRB]. In any event, it has never been authoritatively suggested that this example of injunctive aid to potential jurisdiction, which finds its roots in traditional concepts of the relationship between inferior and superior courts of the same judicial system, has any relevance where the offending action sought to be enjoined is insulated by two intervening and essentially unrelated systems, one of an administrative rather than judicial nature, the other the manifestation of a distinct sovereign authority.

348 U.S. at 519 n.5.

⁹ This holding is simply a restatement of the federalism principle animating the Court's other Anti-Injunction Act cases. These cases reasoned that, because as a general rule the "lower federal courts possess no power whatever to sit in direct review of state court decisions," *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970), lower federal courts have no authority to stay state proceedings "in aid of jurisdiction" unless that jurisdiction vested before the state court proceedings are instituted. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642-43 (1977) (plurality opinion).

habeas jurisdiction is unlike any other type of federal subject matter jurisdiction addressed by the Court's Anti-Injunction Act cases to date. In every other circumstance, the lower federal courts are coequal courts of coordinate jurisdiction with state courts. Federal habeas corpus review, however, creates a markedly different relationship between the lower federal courts and the state courts. Under the federal habeas scheme, the state and federal courts are not "[two] essentially unrelated systems [insulated]" from each other. 348 U.S. at 519 n.5.

"It has long been established . . . that even a single federal judge may overturn the judgment of the highest court of a State" pursuant to 28 U.S.C. § 2241 *et seq.* *Sumner v. Mata*, 449 U.S. 539, 543-44 (1981); *see also Wright v. West*, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring, joined by Blackmun & Stevens, JJ.). In this unusual relationship, the federal habeas courts have an obligation to review state court judgments and decisions. As a result, the federal habeas courts' relationship to the state courts more closely resembles an appellate court's relationship to a lower court than the relationship between coequal courts. Thus, the same justifications may exist for allowing an injunction against state court proceedings to issue in aid of the federal habeas court's prospective jurisdiction over a state court conviction. Accordingly, the Anti-Injunction Act decisions regarding conflicts between federal and state courts of concurrent or coequal jurisdiction cannot be invoked to preclude the application of the second exception to the Anti-Injunction Act in the present context.

Respondent also selectively relies on dicta from the three-Justice plurality opinion in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977), to support its arguments. RB 9 & n.3. Because of the fragmentation of the Court in *Vendo Co.*, the decision has little, if any, precedential value. *See Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE*, § 4224 at 525-526 (1978) ("Detailed analysis of the opinions in *Vendo* would serve no purpose because of the fragmentation of the Court. The decision establishes

that a federal court cannot enjoin a pending state court proceeding in the circumstances of *Vendo* itself, because five justices so held.").¹⁰

Even if Respondent's characterization of the plurality opinion is accurate, the rationale of *Vendo Co.* cannot apply in a federal habeas case. After it lost a breach of contract suit in state court, the state-court defendant in *Vendo Co.* assumed the role of plaintiff in federal court and sought to enjoin the execution of the state court judgment on the ground that the state court proceedings violated the federal antitrust laws. Since the federal antitrust claim at issue in the federal proceedings could have been asserted as an affirmative defense in the breach-of-contract suit in the state court, *Vendo Co.* involved concurrent state and federal actions concerned with the same federal issue. Indeed, the state court defendant originally did assert the federal defense, but subsequently abandoned it, apparently fearing that a hostile state court's rejection of the claim might preclude the federal suit on *res judicata* grounds. *See Vendo Co.*, 433 U.S. at 627.

Conversely, in the context of federal habeas corpus, state court review of federal constitutional claims does not preclude relitigation on federal habeas. *See Brown v. Allen*, 344 U.S. 443 (1953). In creating the federal habeas

¹⁰ Respondent suggests that the plurality opinion states the position of a majority of the Justices with regard to the second exception to the Anti-Injunction Act: "the concurring Justices [in *Vendo Co.*] expressed no disagreement with the plurality's analysis of the 'aid of jurisdiction' point, which was necessary to the judgment in which they concurred." RB at 9 (emphasis added). Respondent is incorrect. Justice Blackmun's concurring opinion – which was joined by Chief Justice Burger – only concurred "in the result" of the plurality's opinion "for reasons that differ significantly from [the reasons] expressed by the plurality." *Vendo Co.*, 433 U.S. at 643 (Blackmun, J., concurring in the result, joined by Burger, C.J.). Notably, Justice Blackmun did not address at all the plurality's discussion of the "in aid of jurisdiction" exception to the Anti-Injunction Act.

corpus statutory scheme, Congress specifically intended that prior state court adjudications of federal constitutional issues would not bind federal courts. The federalism rationale animating the Anti-Injunction Act – that federal court stays of state proceedings are inappropriate because the federal interests can be vindicated in the state courts¹¹ – is thus not appropriate in the special context of *de novo* federal habeas corpus review. This is not to say that the Anti-Injunction Act does not apply to federal habeas proceedings, but merely that its “in aid of jurisdiction” exception, when applied to federal habeas, should incorporate the principles developed to ensure the protection of a superior court’s appellate obligation and jurisdiction to review the decisions of an inferior court.

In sum, the *dicta* in *Clothing Workers* and *Vendo Co.* do not apply in the unique context of federal habeas. The federal habeas statute gives federal district courts the power to review – and effectively to reverse – state court proceedings. That jurisdiction is not concurrent or shared with the state courts, but exclusive. A stay to prevent the prisoner from being executed before federal habeas jurisdiction may be exercised is thus a stay “in aid of” the federal court’s prospective jurisdiction every bit as much as the stay approved in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). Thus, such a stay is expressly authorized by the All Writs Act and the first and second exceptions to the Anti-Injunction Act.

¹¹ See Michael G. Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings*, 66 N.C.L. REV. 49, 51-52 (1987) (“The non-interference [rationale of the Anti-Injunction Act] rest[s] on the underlying assumption that state courts are ordinarily just as competent at deciding federal questions . . . as are federal courts. . . .”).

C. The Canon of *Inclusio Unius Est Exclusio Alterius* Does Not Apply.

Respondent argues that the *inclusio unius est exclusio alterius* canon of statutory interpretation precludes application of the All Writs Act in this case. According to Respondent, because § 2251 expressly provides for stays after a habeas corpus petition has been filed, Congress must have intended that the broader authority of the All Writs Act to issue a stay would never apply in a habeas context. RB at 16-17, 22. Respondent cites *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985):

The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority and not the All Writs Act that is controlling.

Id. at 43; see also RB at 22.¹²

Respondent’s attempt to invoke the *inclusio unius* maxim is unfounded. This principle “‘long ha[s] been subordinated to the doctrine that courts will construe the details of an act in conformity with its . . . general purpose.’” *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-88 n.23 (1983) (citation omitted). The purpose of the larger habeas corpus statutory scheme, including § 848(q)(4)(B), would be frustrated if a stay of execution could not issue before an indigent *pro se* death row inmate were able to file a habeas corpus petition. Indeed, in *Pennsylvania Bureau of Correction*, this Court declined to “categorically rule out reliance on the All Writs Act,” cautioning that “exceptional circumstances” might reveal

¹² In *Pennsylvania Bureau of Correction*, the Court refused to permit a district court to use the All Writs Act to require a U.S. Marshal to bring a prisoner to court to testify as a witness, because another federal statute specifically provided that such a prisoner could be called to testify through a writ of habeas corpus *ad testificandum* directed to the custodian of the prisoner.

"the inadequacy of [the] habeas corpus [statutes]" as applied in certain cases; it therefore expressly left open "the question of the availability of the All Writs Act to authorize such an order where exceptional circumstances require it." 474 U.S. at 43. Unquestionably, Mr. McFarland's case presents such "exceptional circumstances."

If, as Respondent contends, § 2251 is limited to post-petition stays, then, unlike the statute in *Pennsylvania Bureau of Correction*, § 2251 does not "specifically address[] the particular issue at hand. . . ." *Id.* The All Writs Act, on the other hand, does. If Congress did not foresee the issue presented by this case when it provided for the mandatory appointment of counsel for death-sentenced inmates, then that "statutory interstice" can properly be filled by a stay pursuant to the All Writs Act. *Id.* at 41.¹³

¹³ *Amicus* CJLF also relies on the *inclusio unius* maxim, contending that "Congress knows how to unambiguously authorize pre-filing stays when it deems them necessary." CJLF points to 28 U.S.C. § 2101(f), the statute that expressly gives this Court jurisdiction to enter a stay of execution pending the filing of a certiorari petition. See Brief of *Amicus* CJLF at 6-8. CJLF also argues that "McFarland asserts that this Court considers the All Writs Act to be the primary source of its stay authority, but his authority for this proposition is weak." *Id.* at 7.

The CJLF is correct that § 2101(f) applies in a direct appeal case. But § 2101(f) does not give this Court authority to issue stays in capital habeas appeals prior to the filing of a certiorari petition. Section 2101(f) provides that, "[i]n any case in which the final judgment or decree of any court subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." *Id.* (emphasis added). The "final judgment or decree . . . subject to review" in a direct appeal case is the state court conviction and sentence, but in a federal habeas case the judgment under review in this Court is the decision of a federal court of appeals. Thus, in a federal habeas case, the only possible authority permitting this Court to grant

II. BY CREATING A PRE-FILING RIGHT TO FEDERAL HABEAS COUNSEL, CONGRESS INTENDED TO EMPOWER THE FEDERAL COURTS TO GRANT PRE-FILING STAYS OF EXECUTION, AND RESPONDENT'S ARGUMENT MISREADS CONGRESSIONAL INTENT.

As we have argued, the congressional intent behind § 848(q)(4)(B) is a highly important factor in deciding whether the federal courts have the power to stay an execution before a petitioner can file a legally sufficient application, when a stay is necessary for appointed counsel to provide meaningful assistance. Respondent's position that § 848(q)(4)(B) does not empower the federal courts to stay an execution imputes an anomalous and unrealistic intent to Congress.

As noted, Respondent and its *amici* do not dispute the essential remedial purpose behind § 848(q)(4)(B): to assure that death sentenced inmates have the assistance of counsel in federal habeas proceedings, including assistance in preparing and filing the petition. Yet at the same time, Respondent imputes an intent to Congress that, on its face, is inconsistent with this remedial purpose. Respondent argues that despite the right to counsel, Congress did not intend to allow the courts to stay executions prior to the filing of a petition, even if counsel is appointed so close to an execution date that no meaningful assistance can be provided without a stay. Respondent thus imputes to Congress the intention of subordinating

stays is the All Writs Act. Cf. *Woodward v. Hutchins*, 464 U.S. 377 (1984) (per curiam) (citing § 1651); see also *Laws v. Delo*, 491 U.S. 913 (1989) (not citing source of authority for stay); *Bell v. Lynaugh*, 488 U.S. 905 (1988) (same); see generally *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (recognizing the practice of granting stays pending the filing of certiorari petitions in federal habeas cases); *Autry v. Estelle*, 464 U.S. 1 (1983) (same). Notably, this Court has never suggested that the *inclusio unius* maxim precludes such stays in view of § 2101.

the federal right to counsel to the date setting practices of a particular state.

Realizing that Congressional intent would not ordinarily reflect such disharmony, Respondent suggests that no inmate will ever present a legitimate, equitable need for a stay of execution under circumstances in which he has not first had the meaningful assistance of counsel. RB at 16, 17, 22, 35. In Respondent's view, federal appointment of habeas counsel can always be obtained sufficiently in advance of an execution date to avoid any need for a pre-petition stay of execution. *Id.* at 16. *A fortiori*, the only circumstance in which a condemned prisoner might assert such a need is when he, or an agency like the Texas Resource Center, fails to seek appointment of habeas counsel far enough in advance. Respondent uses this case as an example: "McFarland did not have to wait until an execution date was scheduled, much less until 5 days before the scheduled date, to file a request for counsel pursuant to § 848(q)." RB at 22. Since a prisoner would have only himself to blame if he failed to "utilize available processes in a timely fashion," *id.* at 17, no court will ever face a legitimate request for a stay of execution before an application is filed.

To impute such an intent to Congress, however, requires a willingness to ignore the real life circumstances in which condemned, unrepresented prisoners face execution. In Texas, for example, executions are often scheduled to take place within forty-five days of a denial of certiorari on direct appeal. *See, e.g., Washington v. Texas*, 113 S.Ct. 2388 (1993).¹⁴ If habeas counsel is appointed after review is denied, she will almost never have adequate time between appointment and the scheduled execution in which to investigate, prepare and file a complete habeas petition.¹⁵

¹⁴ See Appendix A (listing such cases).

¹⁵ As the American Bar Association *amicus* brief points out, objective studies reveal that the time necessary to represent

Nor may an indigent prisoner fairly be blamed for waiting until after certiorari is denied before seeking the appointment of counsel. *Amicus* CJLF argues that federal appointment could and should be sought long before certiorari is denied, so that the several-month period between affirmance on direct appeal and denial of certiorari can be used to investigate, research, and prepare the federal habeas petition. *See* Brief of *Amicus Curiae* CJLF at 22-23. While this suggestion has utilitarian value, surely no one, not even Respondent, can fault Mr. McFarland for not having pursued this creative course. The idea, first, is exceedingly novel; more important, it collides with federalism concerns. Those concerns suggest that an unrepresented inmate should first seek counsel and a stay, modification, or withdrawal of his execution date in connection with state habeas proceedings – precisely as Mr. McFarland did in state court.¹⁶ In addition, because of Texas' rule against proceeding simultaneously in both state and federal court (the "two forum rule"), a condemned prisoner cannot seek appointment of counsel in state court to file a state habeas petition while certiorari proceedings are pending in this Court after direct appeal. *See Ex Parte Green*, 548 S.W.2d 914 (Tex. Crim. App. 1977).

Thus, a Texas prisoner whose execution is scheduled for forty-five days or less after denial of certiorari, and

capital petitioners in state habeas proceedings is 600 hours, and the time necessary to represent capital petitioners in federal district court habeas proceedings is 300 hours.

¹⁶ Notably, Respondent does not embrace CJLF's suggestion. To the contrary, Respondent's position render CJLF's suggestion academic: "If it is assumed, *arguendo*, that McFarland correctly characterizes § 848(q) as authorizing the appointment of counsel in the absence of a pending habeas action, it was incumbent upon the Center, *after approaching the trial court in a timely manner*, to also approach the federal district court in a timely manner and request the appointment of counsel." RB at 35 (emphasis supplied).

who is unrepresented for habeas proceedings, will have no opportunity to seek federal counsel until he or she is already within forty-five days of execution. Such a person cannot fairly be blamed for "fail[ing] . . . to utilize available processes in a timely fashion," RB at 17, and yet counsel appointed to represent that person may not have enough time to prepare an adequate habeas petition in the time between appointment and execution. Nevertheless, under Respondent's reading of congressional intent, that person's execution could not be stayed by a federal court.

Common sense and experience suggest that there are other circumstances in which a pre-petition stay is necessary to give effect to the statutory right to counsel. Indeed, as the record in this case reflects, present circumstances in Texas make it increasingly difficult to recruit counsel to take Texas capital habeas cases – which led us to argue on Mr. McFarland's behalf that § 848(q)(4)(B) counsel should be appointed before the filing of a habeas petition. See PB at 1-7.

To date, counsel typically have not been appointed in advance of filing a federal petition. Indeed, until the Fifth Circuit's decision in *Gosch v. Collins*, 8 F.3d 20 (5th Cir. 1993), there was no need to pursue such a practice, because other mechanisms assured that no one would be executed without the opportunity for assistance of counsel. PB at 4-7. *Gosch*, however, marked the end of that era of reasonable compromise, and initiated a uniquely critical period in the post-conviction representation of condemned prisoners in Texas. If all such Texas prisoners were required to file fully investigated and adequately prepared habeas petitions filed merely to secure a stay, it would simply be a matter of time before Texas executed an unrepresented inmate.¹⁷ Because the Resource Center

¹⁷ Respondent faults the Resource Center for failing to represent Mr. McFarland after this Court denied his petition for writ of certiorari June 7, 1993. What Respondent fails to

was neither funded nor staffed to undertake direct representation on such a scale, and its ability to recruit counsel could not keep up with the demand, it sought to invoke the only remedy still available – the right to counsel guaranteed by § 848(q)(4)(B).

Obviously, Respondent and the Resource Center's other courtroom adversaries take a different view, and blame the Resource Center for "manufacturing" the crisis in representation. The Resource Center stands by its statements and the arguments of *amici*, which convincingly establish the unfairness of the present circumstances in Texas. Moreover, while the Resource Center could defend the methodological integrity of the Spangenberg Report, or explain the way in which it manages its resources and marshalls its determined efforts even in the face of more than 100 execution dates per year, such a demonstration is unnecessary to the issue before the Court. The question before this Court is simply whether the district court had jurisdiction to stay an imminent

mention, however, is that *this Court denied certiorari in an unprecedented twenty-nine cases in June alone. See Appendix B. Twenty-four cases were denied on a single day, June 28. Id.* As far as we can ascertain, these are records that no state in the nation's history can match. The State of Texas witnessed thirty-nine execution dates in the weeks between June 1 and October 21, when Mr. McFarland asked for a lawyer to represent him in district court. The State executed ten inmates during this period, seven in the five weeks from July 30 to September 3. NAACP Legal Defense Fund, *Death Row, USA* 9-10 (Winter 1993). These too are records for the post-*Furman* era. Many of these cases were handled, directly or indirectly, by attorneys with the Resource Center.

It was in the middle of this period, on August 16, that the trial court, without notice to the Resource Center, first scheduled Mr. McFarland to be executed. Had the Resource Center chosen to represent Mr. McFarland under these circumstances, it is possible the case before this Court would bear the name of another inmate, but it would most assuredly be before this Court.

execution.¹⁸ The Congress that enacted 21 U.S.C. § 848(q)(4)(B) and long ago enacted 28 U.S.C. § 2251 clearly intended for death sentenced inmates to have a day in court before being executed. Respondent misconstrues congressional intent in arguing the contrary.

CONCLUSION

For these reasons, as well as those advanced in Mr. McFarland's opening brief, the judgment of the Fifth Circuit must be reversed and the case remanded to the district court for the appointment of counsel to represent Mr. McFarland in his § 2254 proceeding.

Respectfully submitted,

*MANDY WELCH
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
fax (713) 522-2733

DOUGLAS G. ROBINSON
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7800

*Counsel of Record fax (202) 393-5760

¹⁸ See *FTC v. Dean Foods Company*, 86 S.Ct. 1738, 1741 (1966) ("Since the case comes to us from a dismissal on jurisdictional grounds we must take the allegations of the Commission's application for a preliminary injunction as true.") The district court's ruling that it had no jurisdiction in Mr. McFarland's case was based solely on the failure to file a petition and not on any other grounds.

APPENDIX A EXECUTION DATES WITHIN 45 DAYS AFTER CERTIORARI DENIED

<u>INMATE</u>	<u>SUPREME CT. CASE NO.</u>	<u>DATE CER- TIORARI DENIED</u>	<u>EXECUTION DATE</u>
Hai Hai Vuong	91-8198	11/30/92	1/6/93
Terry Washington	92-8211	5/17/93	6/17/93
Gary Sterling	92-5167	12/14/92	1/25/93
Robert White	92-7042	3/8/93	4/15/93
Leopoldo Narvaiz	92-7039	3/8/93	4/23/93
Kevin Zimmerman	93-5923	GVRed 10/29/93	11/2/93

APPENDIX B

**PETITIONS FOR WRIT OF CERTIORARI
RESOLVED BY THIS COURT IN
TEXAS CAPITAL CASES
JUNE, 1993**

A. Petitions Denied:

1. *Selvage v. Collins*, 113 S.Ct. 2445 (June 1, 1993)
2. *McFarland v. Texas*, 113 S.Ct. 2937 (June 7, 1993)
3. *Jernigan v. Collins*, 113 S.Ct. 2977 (June 14, 1993)
4. *Moreland v. Texas*, 113 S.Ct. 2973 (June 14, 1993)
5. *Green v. Texas*, 113 S.Ct. 3011 (June 21, 1993)
6. *Boggess v. Texas*, 113 S.Ct. 3034 (June 28, 1993)
7. *Jackson v. Texas*, 113 S.Ct. 3034 (June 28, 1993)
8. *Wilkerson v. Collins*, 113 S.Ct. 3035 (June 28, 1993)
9. *Gosch v. Texas*, 113 S.Ct. 3035 (June 28, 1993)
10. *Goss v. Texas*, 113 S.Ct. 3035 (June 28, 1993)
11. *James v. Texas*, 113 S.Ct. 3035 (June 28, 1993)
12. *Fuller v. Texas*, 113 S.Ct. 3035 (June 28, 1993)
13. *Joiner v. Texas*, 113 S.Ct. 3044 (June 28, 1993)
14. *Kelly v. Texas*, 113 S.Ct. 3044 (June 28, 1993)
15. *Draughon v. Texas*, 113 S.Ct. 3045 (June 28, 1993)
16. *Newton v. Texas*, 113 S.Ct. 3045 (June 28, 1993)
17. *Dunn v. Texas*, 113 S.Ct. 3045 (June 28, 1993)
18. *Cantu v. Collins*, 113 S.Ct. 3045 (June 28, 1993)
19. *Bonham v. Texas*, 113 S.Ct. 3046 (June 28, 1993)
20. *Jacobs v. Texas*, 113 S.Ct. 3046 (June 28, 1993)
21. *Blue v. Texas*, 113 S.Ct. 3046 (June 28, 1993)
22. *Rabbani v. Texas*, 113 S.Ct. 3047 (June 28, 1993)
23. *Cooks v. Texas*, 113 S.Ct. 3048 (June 28, 1993)
24. *Hathorn v. Texas*, 113 S.Ct. 3042 (June 28, 1993)
25. *Bridge v. Collins*, 113 S.Ct. 3048 (June 28, 1993)
26. *Holland v. Collins*, 113 S.Ct. 3043 (June 28, 1993)
27. *Harris v. Collins*, 113 S.Ct. 3069 (June 28, 1993)
28. *Drew v. Collins*, 113 S.Ct. 3044 (June 28, 1993)
29. *Cantu v. Texas*, 113 S.Ct. 3046 (June 28, 1993)

B. Petitions Granted

1. *Richardson v. Texas*, 113 S.Ct. 3026 (June 28, 1993)
(*gr'd in light of Johnson v. Texas*, 113 S.Ct. 2658 (1993))
2. *Earhart v. Texas*, 113 S.Ct. 3026 (June 28, 1993)
(same)
3. *Granviel v. Texas*, 113 S.Ct. 3027 (June 28, 1993)
(same)
4. *Lucas v. Texas*, 113 S.Ct. 3029 (June 28, 1993)
(same)
5. *Hawkins v. Texas*, 113 S.Ct. 3029 (June 28, 1993)
(same)

C. Decision On The Merits

1. *Johnson v. Texas*, 113 S.Ct. 2658 (June 14, 1993)
-

APPENDIX C

21 U.S.C. § 848(q):

(q) Appeal in capital cases; counsel for financially unable defendants

(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that -

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

(4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either -

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less

than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications,⁸ for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

⁸ So in original. The comma probably should not appear.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

28 U.S.C. § 1651(a):

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2251:

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

29 U.S.C. § 2254:

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of

available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing

evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

28 U.S.C. § 2283:

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

(11)
No. 93-6497

Supreme Court, U.S.
FILED
MAR 24 1994
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL APPENDIX

*MANDY WELCH
Texas Resource Center
3223 Smith Street
Suite 215
Houston, Texas 77006
(713) 522-5917
fax (713) 522-2733

DOUGLAS G. ROBINSON
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7800
fax (202) 393-5760

*Counsel of Record

Supplement to Appendix C to Reply Brief of Petitioner

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . .

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

. . . .

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

12

93-6497

No. 93-1954

Supreme Court, U.S.
FILED
JAN 13 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

FRANK BASIL McFARLAND,

Petitioner,

vs.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF THE TEXAS CRIMINAL DEFENSE
LAWYERS ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

JIM E. LAVINE
ZIMMERMAN & LAVINE, P.C.
770 South Post Oak Lane
Suite 620
Houston, Texas 77056
(713) 552-0300

*Counsel of Record for Amicus
Curiae*

26 pp

QUESTION PRESENTED

DOES A FEDERAL DISTRICT COURT POSSESS JURISDICTION TO GRANT A STAY OF EXECUTION UNDER EITHER 28 U.S.C. § 2251 OR 28 U.S.C. § 1651(A), IN ORDER TO APPOINT COUNSEL FOR AN INDIGENT *PRO SE* DEATH ROW INMATE WHO HAS NOT YET FILED A HABEAS CORPUS PETITION BUT WHO HAS EXPRESSED AN INTENTION TO FILE A PETITION ONCE COUNSEL IS OBTAINED?

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. UNTIL RECENTLY, MOST CAPITAL HABEAS PETITIONERS IN TEXAS HAVE OBTAINED COUNSEL WHO HAVE BEEN PROVIDED A MEANINGFUL OPPORTUNITY TO DO THE NECESSARY FACTUAL AND LEGAL PREPARATORY WORK PRIOR TO FILING PROPER CAPITAL HABEAS PETITIONS	3
A. Opportunities Made Possible By Trial Level Courts	6
B. Opportunities Made Possible By The Texas Court of Criminal Appeals	6
C. Opportunities Made Possible By Federal Courts	9
D. Substantial Claims Were Often Developed Due To Such Opportunities	10

	<i>Page</i>
II. THERE IS NOW, FOR THE FIRST TIME, A GENERAL INABILITY TO SECURE STAYS SUFFICIENT TO AFFORD COUNSEL A MEANINGFUL OPPORTUNITY TO PREPARE ADEQUATE HABEAS PETITIONS	13
A. The Final Mechanism For Securing Sufficient Stays Has Been Eliminated	13
B. This Situation Will Prevent Most Texas Death Row Inmates From Filing Adequate Habeas Petitions	14
III. UNLESS THIS COURT REVERSES, THERE WILL SURELY BE EXECUTIONS OF PEOPLE WHO, IF THEY HAD HABEAS COUNSEL WITH A MEANINGFUL OPPORTUNITY TO PREPARE ADEQUATE PETITIONS, WOULD HAVE PRESENTED SUCCESSFUL CLAIMS	16
IV. UNDER THESE CIRCUMSTANCES, THE STATUTORY RIGHT TO COUNSEL IN FEDERAL HABEAS WILL GENERALLY BE MEANINGLESS IN TEXAS UNLESS THIS COURT REVERSES	17
CONCLUSION	18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Caldwell v. Collins</i> , No. 3: 92 CV 1316-P (N.D. Texas June 30, 1992) (lodged with the Court as exhibit 10)	10n
<i>DeGarmo v. Collins</i> , No. H-92-357 (S.D. Texas Aug. 6, 1992), <i>appeal dismissed</i> , 984 F.2d 142 (5th Cir. 1993) (lodged with the Court as exhibit 16)	12
<i>Ex Parte Federico Martinez Macias</i> , Writ No. 17,991-02 (Texas Crim. App. May 9, 1988) (lodged with the Court as exhibit 3)	7n
<i>Ex Parte Mitchell</i> , 853 S.W.2d 1 (Texas Crim. App.) (en banc) <i>cert. denied</i> , 114 S. Ct. 183 (1993)	12
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	12
<i>Gosch v. Collins</i> , 8 F.3d 20 (5th Cir. 1993), <i>aff'g</i> SA-93-CA-731 (W.D. Texas Sept. 15, 1993)	13
<i>Guerra v. Collins</i> , No. H-93-290 (S.D. Texas Sept. 30, 1993) (lodged with the Court as exhib- it 17)	12-13
<i>Martinez-Macias v. Collins</i> , 979 F.2d 1067 (5th Cir. 1992)	11
<i>Martinez-Macias v. Collins</i> , 810 F. Supp. 782 (W.D. Texas 1991)	11
<i>McFarland v. Collins</i> , 7 F.3d 47 (5th Cir. 1993)	13

<u>Cases</u>	<u>Page(s)</u>
<i>Narvaiz v. Collins</i> , No. SA-93-CA-0311 (W.D. Texas April 21, 1993) (lodged with the Court as exhibit 11)	10n
<i>State v. Macias</i> , No. 41270-168 (168th Dist. Ct., El Paso Cnty, Texas), Warrant of Execution, July 19, 1988 (lodged with the Court as exhibit 4)	8n
<i>Sterling v. Collins</i> , No. 3-93 CV 0147-G (N.D. Texas Jan. 22, 1993) (lodged with the Court as exhibit 12)	10n
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977)	17n
<i>White v. Director, TDCJ-ID</i> , No. 1: 93 CV 168 (E.D. Texas April 14, 1993) (lodged with the Court as exhibit 13)	10n

Other Authorities

Application for Post-Conviction Writ of Habeas Corpus, received Oct. 31, 1990, and Amended Application for Post-Conviction Writ of Habeas Corpus, received Jan. 7, 1991, in <i>Ex Parte Ricky Don Blackmon</i> , Case No. 12-363A (273d Dist. Ct., Shelby Cnty, Texas and Texas Crim. App.) (excerpts lodged with the Court as exhibit 8).	9n
--	----

<u>Other Authorities</u>	<u>Page(s)</u>
Documents in Support of Application for Post-Conviction Writ of Habeas Corpus, Ex. L-M, P, filed April 2, 1991, and Third Supplemental Documents in Support of Application for Post-Conviction Writ of Habeas Corpus, filed July 22, 1991, in <i>Ex Parte Ricky Don Blackmon</i> , Case No. 12-363A (273rd Dist. Ct., Shelby Cnty, Texas and Texas Crim. App.) (lodged with the Court as exhibit 7).	9n
Elliot, "Ex-inmate Takes Part in Debate on Death Penalty," <i>Austin American-Statesman</i> , August 12, 1993, at A1, A13 (lodged with the Court as exhibit 15).	12
Emergency Application For Stay of Execution Pending The Filing Of A Petition For Writ Of Habeas Corpus, May 4, 1988, in <i>Ex Parte Federico Martinez Macias</i> , No. 41270-168 (168th Dist. Ct., El Paso Cnty, Texas) (lodged with the Court as exhibit 2).	7n
Hernandez, "Jury Refuses to Indict Man On Double-Killing Charges," <i>El Paso Herald-Post</i> , June 23, 1993, at 1 (lodged with the Court as exhibit 14).	11n
Letter dated Jan. 12, 1994 from Mandy Welch to Hon. William Harmon in <i>State v. Marlin Nelson</i> (lodged with the Court as exhibit 18).	14n,15n
Notice of Filing Date for Petition for Writ of Habeas Corpus in <i>Ex Parte Ricky Don Blackmon</i> , Writ No. 21,554-01 (273rd Dist. Ct., Shelby Cnty, Texas and Texas Crim. App.) (lodged with the Court as exhibit 6).	8n

Other Authorities

Page(s)

Petition for Writ of Habeas Corpus in *Ex Parte Federico Martinez Macias* (168th Dist. Ct., El Paso Cnty, Texas and Texas Crim. App.), Sept. 6, 1988 (cover page lodged with the Court as exhibit 5). 8n

Petitioner's Application for Post-Conviction Writ of Habeas Corpus in *Ex Parte Mata*, No. 8028 (278th Dist. Ct., Madison Cnty, Texas and Texas Crim. App.) (excerpts lodged with the Court as exhibit 1). 6n

Reply Brief of Petitioner-Appellant in *Blackmon v. Collins*, No. 92-5192, filed Aug. 11, 1993 (5th Cir.) (cover page lodged with the Court as exhibit 9). 9n

The Spangenberg Group, A Study of Representation of Capital Cases in Texas (March 1993) (lodged with the Court by the ABA). 4n,5&n,8n, 14n,15n,17n

Texas Resource Center Board of Directors, Crisis in Representation of Texas Death Row Inmates (Oct. 26, 1993) (lodged with the Court by the ABA). 5n,6n,9n, 12n,13,14n

No. 93-1954

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FRANK BASIL McFARLAND,

Petitioner,

vs.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF OF
THE TEXAS CRIMINAL DEFENSE LAWYERS
ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

The Texas Criminal Defense Lawyers Association submits this brief as *amicus curiae*, pursuant to Rule 37 of the Court's rules, to assist the Court in determining whether the federal courts can grant stays of execution to permit counsel to be obtained and to investigate a case sufficiently to prepare a meaningful habeas corpus petition.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Texas Criminal Defense Lawyers Association is a Texas non-profit corporation which has over 1300 members throughout Texas. Its purpose is to "protect and insure by rule of law those individual rights guaranteed by the Texas and federal Constitutions in criminal cases; to resist the constant efforts which are being made to curtail those rights; to encourage cooperation between lawyers engaged in the furtherance of these objectives through educational programs and other assistance; and through this cooperation, education, and assistance to promote justice and the common good." Art. II, Texas Criminal Defense Lawyers Association Bylaws.

Member attorneys of the Texas Criminal Defense Lawyers Association devote at least a substantial part of their practices to the defense of citizens accused of crimes. Frequently, member attorneys serve as counsel to condemned prisoners in state and federal habeas corpus proceedings. The Texas Criminal Defense Lawyers Association thus has an interest in providing the Court with information necessary to a full understanding of the factual and procedural context in which capital habeas cases arise and are litigated. By so doing, the Texas Criminal Defense Lawyers Association hopes to facilitate the proper resolution of the question presented in this case. The Texas Criminal Defense Lawyers Association has obtained the consent of both parties to file this brief, and will lodge with the Clerk letters confirming those consents.

SUMMARY OF ARGUMENT

The Texas Criminal Defense Lawyers Association submits this brief as *amicus curiae* because of its belief that information about the context in which this litigation has arisen is critical to the just disposition of Mr. McFarland's case.

Long before this litigation commenced, it was apparent that Texas faced a looming crisis in the availability of counsel for capital habeas cases. But notwithstanding the growing number of Texas death row inmates in need of counsel to represent them in state and federal habeas proceedings, they usually ended up with counsel who had a meaningful opportunity to do the factual investigations and legal analyses that are the necessary prerequisites to the filing and litigation of proper habeas corpus petitions. This was possible due to a variety of mechanisms that forestalled or stayed execution dates until counsel were located and completed the necessary preparatory work.

However, in late 1993, the federal district courts and the Fifth Circuit eliminated the last of these protective mechanisms. Accordingly, there is now a grave risk that executions will be permitted in Texas in cases in which there has been no meaningful opportunity to prepare adequate habeas corpus petitions. If this occurs, the consequences will be intolerable. The histories of cases in which Texas death row inmates *have* had habeas counsel with appropriate opportunities to represent them demonstrate that if such counsel are no longer available, significant numbers of people will be executed who would instead secure relief if they had such counsel.

ARGUMENT

I.

UNTIL RECENTLY, MOST CAPITAL HABEAS
PETITIONERS IN TEXAS HAVE OBTAINED COUNSEL
WHO HAVE BEEN PROVIDED A MEANINGFUL
OPPORTUNITY TO DO THE NECESSARY FACTUAL AND
LEGAL PREPARATORY WORK PRIOR TO FILING
PROPER CAPITAL HABEAS PETITIONS

As the ABA's *amicus curiae* brief shows, it is generally recognized that a prerequisite to the filing of an adequate habeas corpus petition in a capital case is a meaningful opportunity for

counsel with adequate resources to (a) review the existing record, (b) undertake a substantial factual investigation to determine whether additional claims should be raised, and (c) undertake legal research on the many complex procedural and substantive issues which these cases typically present.¹

In many Texas cases, this prerequisite has been difficult to meet, because Texas makes it exceedingly hard to obtain lawyers for death row inmates. Even though Texas courts have the discretion to appoint and compensate counsel and to allow funds for investigation in state habeas proceedings, "this is almost never done."² Many Texas lawyers would be willing to represent death-sentenced prisoners in state habeas proceedings if they were compensated, but very few are willing to do so without compensation.³ Moreover, the few who are willing to undertake *pro bono*

¹ See Brief of the American Bar Association As *Amicus Curiae* In Support of Petitioner ("ABA Amicus Brief"), Sections IB, II, III and IV; see also The Spangenberg Group, A Study of Representation of Capital Cases in Texas (March 1993) ("Spangenberg 1993 Texas Study") (lodged with the Court by the ABA), at 97 (ineffective assistance of counsel issues, which are first raised in state habeas proceedings, "require substantial time to investigate and because of the lack of uniform quality of appointed counsel in capital cases at trial, as well as the inadequate funding for counsel and experts, ineffectiveness claims have to be filed in most cases").

² See Spangenberg 1993 Texas Study, at vii ("Despite the fact that * * * the Code of Criminal Procedure in Texas gives the district court judges discretion to appoint counsel and to compensate them in state habeas proceedings, this is almost never done. Only three of the 33 attorneys in the study who had served as counsel in state habeas capital cases reported that they received compensation. Despite the fact that district court judges under the statute have the authority to provide funds for experts and expenses, these are almost never approved.")

³ See Spangenberg 1993 Texas Study, at 30-32, 36.

representation are discouraged from entering cases by the State's use of execution dates to catapult cases into and through habeas corpus proceedings.⁴ As the Spangenberg 1993 Texas Study, prepared for the Texas Bar Association, found:

* * * It is far more difficult to get a lawyer to step into a case under an active execution warrant than it is when there is substantial time to prepare for the case.

* * *

When warrants are issued in cases where there is no counsel, the results may be dire. An attorney may be recruited hastily and often the recruited counsel have no familiarity with the highly technical capital case legal issues; important constitutional issues are often not raised or properly litigated * * *.⁵

Notwithstanding these adverse conditions, until the latter part of 1993, counsel have usually been secured to represent capital habeas petitioners in Texas and have generally had a meaningful opportunity to do the careful review of the record, extensive

⁴ See *id.* at 5 ("Once the Court of Criminal Appeals affirms a sentence of death, the state district court often sets an early execution date."); Texas Resource Center Board of Directors, Crisis in Representation of Texas Death Row Inmates (Oct. 26, 1993) ("Board of Directors Statement") (lodged with the Court by the ABA), at 9 ("the state courts use execution dates to force cases through the system").

⁵ See Spangenberg 1993 Texas Study, at vii, 6.

factual investigation and thorough review of the procedural and substantive legal issues which are necessary to the preparation of adequate habeas corpus claims. These opportunities grew out of a variety of circumstances which enabled death row inmates, and those attempting to secure counsel for them, to overcome the difficulties presented by the general refusal of state habeas judges in Texas to appoint or compensate counsel in these cases and the state courts' use of execution dates soon after the end of direct appeals as a means of docket control.

A. Opportunities Made Possible By Trial Level Courts

In some cases, meaningful opportunities to prepare properly have existed because the state trial level courts did not set early execution dates as a means of controlling their dockets. Instead, they set reasonable time limits for the Texas Resource Center or others to find counsel and for counsel, once found, to file habeas petitions; or they were satisfied to let prosecutors and the Texas Resource Center make arrangements on these matters.⁶

B. Opportunities Made Possible By The Texas Court of Criminal Appeals

In many cases, the Texas Court of Criminal Appeals (sometimes in combination with other courts) granted stays of sufficient length that counsel were able to do the factual and legal work necessary for the preparation of adequate habeas petitions.

⁶ See Board of Directors Statement, at 4. For example, in *Ex Parte Mata*, No. 8028 (278th Dist. Ct., Madison Cnty, Texas and Texas Crim. App.), the trial level court (after giving the Texas Resource Center sixty days to recruit state habeas counsel) gave volunteer counsel 120 days, and then 30 additional days, in which to file Mr. Mata's state habeas petition. See excerpts from Petitioner's Application for Post-Conviction Writ of Habeas Corpus (lodged with the Court as exhibit 1).

In some instances, counsel who had just begun work on cases were able to secure stays for the express purpose of enabling them to complete the preparatory work necessary to file adequate habeas petitions. An example is the case of Federico Martinez Macias. After this Court denied the direct appeal certiorari petition on February 22, 1988, the trial court set an execution date for May 13, 1988. Volunteer counsel agreed in early March 1988 to represent Mr. Macias. Over the next two months, that counsel did substantial investigatory work but had "only begun to scratch the surface of many serious issues raised in this case."⁷ Accordingly, in early May 1988, the volunteer counsel sought a stay of execution to enable the investigation to be completed.⁸ Although the district court denied a stay, the Court of Criminal Appeals granted a 60-day stay on May 9, 1988.⁹ After that stay expired,

⁷ See Emergency Application For Stay Of Execution Pending The Filing Of A Petition For Writ Of Habeas Corpus, May 4, 1988, in *Ex Parte Federico Martinez Macias*, No. 41270-168 (168th Dist. Ct., El Paso Cnty, Texas), at 1-2, 4, 6 (lodged with the Court as exhibit 2).

⁸ *Id.*

⁹ See Order, *Ex Parte Federico Martinez Macias*, Writ No. 17,991-02 (Texas Crim. App. May 9, 1988) (per curiam)(en banc)(lodged with the Court as exhibit 3). In concurring in the granting of the stay, Judge Teague said that "Because this Court will not act to fill the void, and because of the obvious flaws in the system that presently exists, as long as the Legislature is going to let the express train operate within Texas, I believe that it is incumbent upon the Legislature, at the first opportunity, to enact legislation that will provide those passengers whose tickets are stamped 'The death chambers in Huntsville' with the opportunity to be represented by court appointed counsel, should they desire to have such counsel represent them, and they are indigent. * * * Otherwise, I believe that we will continue to see what I believe are mere band aid or stop gap measures that causes justice, if not completely thwarted, at least to be unreasonably delayed." *Id.*, Concurring Opinion (Teague, J.), at 2, 4.

a September 15, 1988 execution date was set, and the volunteer counsel filed Mr. Macias' state habeas petition on September 7, 1988.¹⁰ Thus, counsel for Mr. Macias had a total of six months, from March to September, to review the existing record, perform an extensive factual investigation, do legal research, and prepare an adequate habeas corpus petition. As discussed at pages 10-11 below, the work which Mr. Macias' volunteer counsel did during those six months ultimately led to Mr. Macias' being granted relief in federal habeas corpus proceedings and then, following the grand jury's refusal to re-indict him, his release from prison.

In other cases, the Court of Criminal Appeals granted stays for the express purpose of enabling the Texas Resource Center to secure counsel who would have several months to do the necessary factual and legal preparatory work to enable the filing of an adequate habeas petition. For example, in the case of Ricky Don Blackmon, in which an execution date was set shortly after this Court denied the direct appeal certiorari petition, the Court of Criminal Appeals granted the Resource Center's motion for a 120-day stay to enable it to recruit counsel and for the preparation of a proper habeas petition. The Resource Center was unable to secure counsel but was able itself¹¹ to develop evidence, including prosecutors' file documents and affidavits from a jailer and infor-

¹⁰ See July 19, 1988 Warrant of Execution in *State v. Macias*, No. 41270-168 (168th Dist. Ct., El Paso Cnty, Texas), and cover page of September 6, 1988 Petition for Writ of Habeas Corpus in *Ex Parte Federico Martinez Macias* (168th Dist. Ct., El Paso Cnty, Texas and Texas Crim. App.) (lodged with the Court as exhibits 4 and 5).

¹¹ See Notice of Filing Date for Petition for Writ of Habeas Corpus in *Ex Parte Ricky Don Blackmon*, Writ No. 21,554-01 (273rd Dist. Ct., Shelby Cnty, Texas and Texas Crim. App.), at 1 (lodged with the Court as exhibit 6). While the Texas Resource Center has had a limited ability to assume the burden of providing representation itself in some cases, such as Blackmon's, it has never been able to do so in most Texas cases. See Spangenberg 1993 Texas Report, at 9.

nants¹², which supported constitutional claims that were presented in a state habeas petition filed before another execution date was set and in an amended petition filed about two months thereafter.¹³ No relief has thus far been granted, but the case has been appealed to the Fifth Circuit,¹⁴ and oral argument has been held.

C. Opportunities Made Possible By Federal Courts

Beginning in the fall of 1991, the Texas Court of Criminal Appeals generally stopped granting stays under the circumstances described in part B, above.¹⁵ For about two years thereafter, when opportunities for preparing adequate habeas petitions were not made available in the manner described in part A, above, the Texas Resource Center was nevertheless usually able to ensure that such adequate opportunities existed. It did so by providing representation itself in a very limited number of cases and by securing stays from federal courts in numerous other cases after

¹² See Documents in Support of Application for Post-conviction Writ of Habeas Corpus, Exhibits L-M, P, filed April 2, 1991, and Third Supplemental Documents in Support of Application for Post-Conviction Writ of Habeas Corpus, filed July 22, 1991, in *Ex Parte Ricky Don Blackmon*, Case No. 12-363A (273rd Dist. Ct., Shelby Cnty, Texas and Texas Crim. App.) (lodged with the Court as exhibit 7).

¹³ See Application For Post-Conviction Writ of Habeas Corpus, received Oct. 31, 1990, at 1, 71-72, 132, and Amended Application for Post-Conviction Writ of Habeas Corpus, received Jan. 7, 1991, at 1-10, 23-26, in *Ex Parte Ricky Don Blackmon*, Case No. 12-363A (273rd Dist. Ct., Shelby Cnty, Texas and Texas Crim. App.) (excerpts lodged with the Court as exhibit 8).

¹⁴ See Reply Brief of Petitioner-Appellant in *Blackmon v. Collins*, No. 92-5192, filed Aug. 11, 1993 (5th Cir.), cover page (lodged with the Court as exhibit 9).

¹⁵ See Board of Directors Statement, at 5.

filing perfunctory federal habeas corpus petitions, *i.e.*, petitions containing at least one issue which had been raised in state court.¹⁶ During the pendency of such stays, counsel were generally found (or were appointed as part of the stay orders) and then had the time necessary to do the preparatory work which enabled them to file adequate habeas corpus petitions. Since many of the claims in such petitions had not been exhausted, the petitions were often dismissed without prejudice; the unexhausted claims were then presented to the state courts in initial state habeas petitions. Because the federal courts were willing to grant stays to allow this process of claim development to take place, the opportunity necessary for counsel to provide meaningful assistance still existed.

D. Substantial Claims Were Often Developed Due To Such Opportunities

In a significant number of cases, counsel who, as a result of one of the mechanisms described above, had a meaningful opportunity to do the factual and legal work necessary to prepare adequate habeas petitions have presented substantial claims — some of which have already been successful.

One of the most notable examples is that of Federico Martinez Macias, whose case was discussed at pages 7-8 above. As a result of the six-month investigation by volunteer counsel, Macias presented evidence which led the federal district court to conclude that his trial counsel had provided prejudicially ineffective assistance of counsel at both phases of the trial. As a result,

¹⁶ Among the cases in which such stays were granted were *Caldwell v. Collins*, No. 3: 92 CV 1316-P (N.D. Texas June 30, 1992); *Narvaiz v. Collins*, No. SA-93-CA-0311 (W.D. Texas April 21, 1993); *Sterling v. Collins*, No. 3-93 CV 0147-G (N.D. Texas Jan. 22, 1993); and *White v. Director, TDCJ-ID*, No. 1: 93 CV 168 (E.D. Texas April 14, 1993). Copies of the pertinent orders in these cases are lodged with the Court as exhibits 10-13.

both the conviction and the death sentence were vacated. In so holding, the district court found, *inter alia*, that trial counsel had incompetently failed to call (a) an available alibi witness who could have provided "powerful evidence in support of [Macias'] defense" and (b) an investigator or Macias' daughters, who "could have provided valuable" testimony in refutation of the prosecution's key witnesses. See *Martinez-Macias v. Collins*, 810 F. Supp. 782, 786-87 (W.D. Texas 1991). In affirming the district court's decision, the Fifth Circuit stated:

We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense counsel \$11.84 per hour. Unfortunately, the justice system got only what it paid for.

Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992). Thereafter, the District Attorney attempted to persuade a grand jury to reindict Macias, but it refused to do so, and he was released.¹⁷

After Andrew Lee Mitchell came within five days of being executed, a stay was secured and a volunteer attorney proceeded to represent him properly in state habeas proceedings. The volunteer attorney presented an affidavit from the trial prosecutor "stating that he had found evidence of Mitchell's possible innocence that was not given to him before the trial," including "statements from two police officers who said they had seen the victim

¹⁷ See Hernandez, "Jury Refuses to Indict Man On Double-Killing Charges," *El Paso Herald-Post*, June 23, 1993, at 1 (lodged with the Court as exhibit 14).

alive after the prosecution claimed the murder had taken place."¹⁸ This meant that the actual murder time could have been a time for which Mitchell had an alibi. On the basis of this evidence, the Texas Court of Criminal Appeals reversed Mitchell's conviction, holding that the State had suppressed critical evidence that could have exonerated Mitchell. *See Ex Parte Mitchell*, 853 S.W.2d 1, 4-6 (Texas Crim. App.) (en banc) *cert. denied*, 114 S. Ct. 183 (1993). Mitchell was subsequently released after thirteen years, seven months and five days on death row (although a retrial was possible). *See* Elliot, "Ex-inmate Takes Part in Debate on Death Penalty," *Austin American-Statesman*, August 12, 1993, at A1, A13 (lodged with the Court as exhibit 15).

Roger DeGarmo was able to present a successful constitutional claim of prosecutorial misconduct under *Giglio v. United States*, 405 U.S. 150 (1972), after he secured counsel who had a meaningful opportunity to investigate his case. Although DeGarmo lost in the state habeas courts, he prevailed in federal court, on the basis of prosecutorial records and testimony presented by his volunteer counsel which clearly demonstrated a *Giglio* violation. *See DeGarmo v. Collins*, No. H-92-357 (S.D. Texas Aug. 6, 1992), *appeal dismissed*, 984 F.2d 142 (5th Cir. 1993).¹⁹

There are numerous other cases in which substantial evidence has been developed by volunteer attorneys who have had a meaningful opportunity to investigate. Many of these cases are still awaiting final disposition, but the manner in which the courts have handled them confirms the significance of the claims presented. One such case, still pending, is that of Ricardo Aldape Guerra. The federal district court ordered an evidentiary hearing in *Guerra* after concluding, on the basis of volunteer counsel's investigation, "that the conduct of the police officers and the

¹⁸ See Board of Directors Statement, at 9.

¹⁹ A copy of the district court's decision is lodged with the Court as exhibit 16.

behavior of prosecutors may have tainted the in-court identification resulting in a misidentification." *See Guerra v. Collins*, No. H-93-290 (S.D. Texas Sept. 30, 1993), at 3 (granting evidentiary hearing) (lodged with the Court as exhibit 17); *see also* Board of Directors Statement, at 9-10.

II.

THERE IS NOW, FOR THE FIRST TIME, A GENERAL INABILITY TO SECURE STAYS SUFFICIENT TO AFFORD COUNSEL A MEANINGFUL OPPORTUNITY TO PREPARE ADEQUATE HABEAS PETITIONS

A. The Final Mechanism For Securing Sufficient Stays Has Been Eliminated

The Fifth Circuit's decisions in *Gosch v. Collins*, 8 F.3d 20 (5th Cir.), *aff'g* SA-93-CA-731 (W.D. Texas Sept. 15, 1993), and the present case, *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993) (per curiam), have eliminated the final mechanism for securing a meaningful opportunity to prepare adequate habeas petitions in the many cases in which Texas trial level courts set and do not stay execution dates shortly after this Court denies direct appeal certiorari petitions. That mechanism, as discussed in part IC above, was the granting of stays on the basis of admittedly perfunctory federal habeas petitions. *Gosch* has made stays under such circumstances impossible. In the present case, the Fifth Circuit has held that stays cannot be granted *prior to* the filing of a federal habeas petition. Since, as discussed at page 9 above, the Texas Court of Criminal Appeals has generally discontinued granting stays which enable counsel to prepare adequate habeas petitions, there is now for the first time *no way* to stop executions in the most typical Texas capital cases: cases in which *no* counsel are in position sufficiently in advance of the extremely early execution dates to do the necessary investigatory and legal work which are generally preconditions to filing proper habeas petitions.

Meanwhile, the number of cases in which this situation can arise is increasing. The number of death sentences affirmed by the Court of Criminal Appeals has virtually doubled, and the number of execution dates has increased substantially, over the past two years.²⁰

B. This Situation Will Prevent Most Texas Death Row Inmates From Filing Adequate Habeas Petitions

These recent developments have occurred in a state which was already in a capital habeas counsel crisis, due to, *inter alia*, the general lack of appointments of and compensation for counsel in state habeas, the decrease in the willingness of attorneys in private practice to handle these cases, the lack of any centralized mechanism for setting execution dates, and the fact that — in view of the lack of a public defender system in most parts of Texas and the meager payments made to appointed trial counsel — the defense's pre-trial investigation is typically far less complete than in other states.²¹ Accordingly, even before late 1993, when it became generally impossible to secure stays that would give counsel a meaningful opportunity to prepare adequate habeas petitions, a report to the Texas State Bar had concluded that "the situation in Texas can only be described as desperate."²²

²⁰ The Court of Criminal Appeals affirmed 28 death sentences in 1991, but affirmed 56 death sentences in 1993. As compared to 64 execution dates in Texas in 1991, there were 94 Texas execution dates in 1993. See letter dated Jan. 12, 1994 from Mandy Welch to Hon. William Harmon in *State v. Marlin Nelson* (lodged with the Court as exhibit 18), at 1-2; Board of Directors Statement, at 5.

²¹ See Spangenberg 1993 Texas Report, at i-iv, vi-viii, 9, 96-97, 120, 122, 130-31, 146, 151-52, 160-62, 168.

²² *Id.* at 6.

In view of this pre-existing crisis, it is unsurprising that when it *did* become generally impossible to secure stays in Texas capital cases with execution dates set shortly after this Court's denial of direct appeal certiorari petitions, the crisis became considerably worse. Thus, it has become far more difficult to find counsel to handle these cases, and counsel who do take them on do not have a meaningful opportunity to prepare adequate habeas petitions. As of January 12, 1994, there were seven unrepresented Texas death row inmates with execution dates scheduled on or before March 18, 1994²³ — in most instances shortly after this Court's initial denial of certiorari. These are among about 70 Texas death row inmates with no attorneys to handle their habeas proceedings.²⁴ Under these circumstances, the Texas Resource Center, which even before the general unavailability of stays was "simply not equipped to handle the amount of work required of it by current practices regarding the appointment of counsel in capital cases" — notwithstanding its "enormous effort in a wide variety of areas,"²⁵ cannot solve the problem by representing most or all of these unrepresented death row inmates itself. See ABA Amicus Brief section IA; Petitioner's Brief, Statement of the Case.

Instead, most of the Texas death row inmates who, if they had counsel with a meaningful opportunity to prepare adequate habeas petitions, would have claims as meritorious as those of Federico Martinez Macias, Andrew Lee Mitchell and Roger DeGarmo (see pages 10-12 above) will not be able to find habeas lawyers and will be executed without anyone knowing that they could have presented such strong claims. The Petitioner in this case, Frank McFarland, could be one such person. No one knows whether Mr. McFarland, if properly represented in habeas, could

²³ See letter dated Jan. 12, 1994 from Mandy Welch to Hon. William Harmon in *State v. Marlin Nelson*, at 2.

²⁴ *Id.* at 1.

²⁵ See Spangenberg 1993 Texas Report, at 9.

present claims as deserving of relief as Macias, Mitchell and DeGarmo. He might be able to do so, but if he and others in his situation are routinely put to death without a meaningful opportunity for habeas counsel to prepare their cases, no one will *ever* know how strong their claims would have been. Instead, in future cases like those of Macias, Mitchell and DeGarmo — in which defense counsel is woefully ineffective or prosecutors or police officers abuse their positions of trust to get convictions — habeas corpus will no longer be available to provide relief. Thus, for people in Mr. McFarland's posture who are unfortunate enough to have no habeas counsel, an affirmance here would in effect amount to a holding that they have no right of access to federal habeas corpus, no matter how unconstitutional their convictions or death sentences may be.

III.

UNLESS THIS COURT REVERSES, THERE WILL SURELY
BE EXECUTIONS OF PEOPLE WHO, IF THEY HAD
HABEAS COUNSEL WITH A MEANINGFUL
OPPORTUNITY TO PREPARE ADEQUATE PETITIONS,
WOULD HAVE PRESENTED SUCCESSFUL CLAIMS

In many past cases, such as those discussed in part ID above, Texas death row inmates who had counsel with adequate resources and sufficient time in which to do the necessary review of the record, factual investigation, and legal research have secured relief. It is therefore apparent that if in the future Texas death row inmates typically do *not* have counsel with a meaningful opportunity to prepare, a significant number of death row inmates who would have secured relief if they had had such counsel will be executed in Texas. The fact that we will never know *which* executed people would have presented such claims does not make this tragic conclusion any less of a certainty.

While it is to be hoped that capital trials will usually prove to be "the main event,"²⁶ the egregious problems with Texas defense counsel at capital trials²⁷ and the instances of hidden State misconduct (such as in the Mitchell and DeGarmo cases discussed at pages 11-12 above) mean that what should be the "main event" has often been a "fixed fight." Yet, without habeas counsel who have an adequate opportunity to uncover the crucial facts, that "fixed fight" will end up being the *only* "fight," and its loser will be executed without anyone knowing that the fight was "fixed." All we will know is that some victims of "fixed fights" will inevitably be executed.

IV.

UNDER THESE CIRCUMSTANCES, THE STATUTORY
RIGHT TO COUNSEL IN FEDERAL HABEAS WILL
GENERALLY BE MEANINGLESS IN TEXAS UNLESS
THIS COURT REVERSES

As is comprehensively discussed in Petitioner's brief, Congress, in providing for counsel for death row inmates in federal habeas corpus proceedings, intended to ensure that people not go to their deaths without having had habeas counsel with a meaningful opportunity to develop and litigate proper petitions. To return to this Court's "main event" analogy, Congress wanted death row inmates whose "main events" had been "fixed fights" to have counsel who could expose what had happened, so that either a "rematch" could be scheduled or, as in Macias' case, the death row inmate could be declared the "victor."

Congress surely did not contemplate that the statute could be rendered meaningless in states which combine a general refusal to appoint or compensate counsel in state habeas with the frequent

²⁶ See *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

²⁷ See Spangenberg 1993 Texas Report, at iii-iv, vi-vii, 97, 120, 122.

setting of execution dates soon after the denial of direct appeal certiorari petitions. *See* Petitioner's Brief. Accordingly, this Court should reverse the Fifth Circuit's decision here.

CONCLUSION

For all the reasons presented above, and in the Petitioner's Brief and the other *amici curiae* briefs submitted in support of the Petitioner, this Court should reverse the decision of the Court below.

Dated: January 13, 1994

Respectfully submitted,

JIM E. LAVINE
Zimmerman & Lavine, P.C.
770 South Post Oak Lane
Suite 620
Houston, Texas 77056
(713) 552-0300

*Attorney for Amicus
Curiae The Texas
Criminal Defense
Lawyers Association
and
Counsel of Record*

JAN 13 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,

Petitioner,

—v.—

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE AMERICAN
CIVIL LIBERTIES UNION AND THE ACLU OF TEXAS
IN SUPPORT OF PETITIONER**

Larry W. Yackle
(*Counsel of Record*)
Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Diann Y. Rust-Tierney
Capital Punishment Project
American Civil Liberties Union
Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-1681

39 pp

ISSUE PRESENTED

Does a United States district court have authority to stay the execution of an unrepresented state prisoner during the time required for the court to appoint counsel and for counsel to prepare a meaningful federal habeas corpus petition attacking the constitutionality of the death sentence?

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	
INTEREST OF <i>AMICUS</i>	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. A DISTRICT COURT HAS AUTHORITY TO STAY THE EXECUTION OF AN UNREPRESENTED STATE PRISONER DURING THE TIME REQUIRED FOR THE COURT TO APPOINT COUNSEL AND FOR COUNSEL TO PREPARE A MEANINGFUL HABEAS CORPUS PETITION	6
A. The Plain Meaning of §2251 and §1651	7
B. The Cumulative Effect of §2251, §1651, and §848	10
C. Alternatives to a Pre-Petition Stay	14
II. A PRE-PETITION STAY IS ESSENTIAL TO THE CONGRESSIONALLY PRESCRIBED POLICY OF PERMITTING A STATE PRISONER TO ATTACK A DEATH SENTENCE IN FEDERAL HABEAS CORPUS WITH THE ASSISTANCE OF A COMPETENT LAWYER	17

	<i>Page</i>
III. THE DENIAL OF A STAY WOULD UNDERMINE THE DISTRICT COURTS JURISDICTION TO DE- TERMINE THE MERITS OF PROP- ERLY PRESENTED CLAIMS	23
CONCLUSION	28

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Amadeo v. Zant</i> , 486 U.S. 214 (1988)	20, 23
<i>Armstrong v. Dugger</i> , 833 F.2d 1430 (11th Cir. 1987)	20
<i>Autry v. Estelle</i> , 464 U.S. 1 (1983)	17
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	6, 16
<i>Bowen v. Maynard</i> , 799 F.2d 593 (10th Cir.), cert. denied, 479 U.S. 962 (1986)	20
<i>Brown v. Allen</i> , 344 U.S. 443 (1953)	10, 23, 25
<i>Brown v. Vasquez</i> , 952 F.2d 1164 (9th Cir. 1991), cert. denied, 112 S.Ct. 1778 (1992)	3, 14
<i>Brown v. Wainwright</i> , 785 F.2d 1457 (11th Cir. 1986)	20
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977)	12
<i>Chambers v. Armontrout</i> , 885 F.2d 1318 (8th Cir. 1989)	20
<i>Chaney v. Brown</i> , 730 F.2d 1334 (10th Cir.), cert. denied, 469 U.S. 1090 (1984)	20
<i>Christianson v. Colt</i> , 486 U.S. 800 (1988)	13
<i>Coleman v. Thompson</i> , 501 U.S. ___, 111 S.Ct. 2546 (1991)	24, 26, 27

	<i>Page</i>
<i>Coleman v. Vasquez</i> , 771 F.Supp. 300 (N.D.Cal. 1991)	15
<i>Cunningham v. Zant</i> , 928 F.2d 1006 (11th Cir. 1991)	20
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986)	19
<i>Estelle v. Smith</i> , 451 U.S. 454 (1981)	23
<i>Evans v. Lewis</i> , 855 F.2d 631 (9th Cir. 1988)	20
<i>Finley v. United States</i> , 490 U.S. 545 (1989)	14
<i>Francis v. Franklin</i> , 471 U.S. 307 (1985)	23
<i>Freeman v. Georgia</i> , 599 F.2d 65 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980)	20
<i>FTC v. Dean Foods</i> , 384 U.S. 597 (1966)	9
<i>Gilmore v. Taylor</i> , 508 U.S. ___, 113 S.Ct. 2112 (1993)	25, 26
<i>Gosch v. Collins</i> , No. SA-93-CA-731 (W.D.Tex. Sept. 15, 1993), aff'd, 8 F.3d 20 (5th Cir. 1993), petition for cert. filed	11, 15, 17
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	17
<i>Haines v. Kerner</i> , 404 U.S. 519 (1972)	14

	<i>Page</i>
<i>Hilton v. South Carolina Public Ry. Comm'n</i> , 502 U.S. ___, 112 S.Ct. 560 (1991)	27
<i>Hitchcock v. Dugger</i> , 481 U.S. 393 (1987)	23
<i>Horton v. Zant</i> , 941 F.2d 1449 (11th Cir. 1991)	20
<i>House v. Balkcom</i> , 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870 (1984)	20
<i>ITT Community Development Corp. v. Barton</i> , 569 F.2d 1351 (5th Cir. 1978)	9
<i>Jones v. Thigpen</i> , 788 F.2d 1101 (5th Cir. 1986)	20
<i>Keeney v. Tamayo-Reyes</i> , 504 U.S. ___, 112 S.Ct. 1715 (1992)	26
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986)	19
<i>Kremer v. Chemical Constr. Corp.</i> , 456 U.S. 461 (1982)	10
<i>Lewis v. Lane</i> , 832 F.2d 1446 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988)	20
<i>Lindsey v. King</i> , 769 F.2d 1034 (5th Cir. 1985)	20
<i>Maynard v. Cartwright</i> , 486 U.S. 356 (1988)	23
<i>McClellan v. Carland</i> , 217 U.S. 268 (1910)	9

	<i>Page</i>
<i>McCleskey v. Zant</i> , 499 U.S. ___, 111 S.Ct. 1454 (1991)	15, 22, 24, 25, 26
<i>McDowell v. Dixon</i> , 858 F.2d 945 (4th Cir. 1988)	20, 21
<i>Middleton v. Dugger</i> , 849 F.2d 491 (11th Cir. 1988)	20
<i>Miller v. Fenton</i> , 474 U.S. 104 (1985)	25
<i>Murray v. Giarratano</i> , 492 U.S. 1 (1989)	6, 7, 18
<i>Pennsylvania v. Union Gas</i> , 491 U.S. 1 (1989)	12
<i>Penson v. Ohio</i> , 488 U.S. 75 (1988)	20
<i>Pilchak v. Camper</i> , 935 F.2d 145 (8th Cir. 1991)	20
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932)	5
<i>Rooker v. Fidelity Trust Company</i> , 263 U.S. 413 (1923)	9
<i>Rose v. Lundy</i> , 455 U.S. 509 (1982)	22, 24, 27
<i>Ruffin v. Kemp</i> , 767 F.2d 748 (11th Cir. 1985)	20
<i>Smith v. Wainwright</i> , 799 F.2d 1442 (11th Cir. 1986)	20
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984)	19

	<i>Page</i>
<i>Stephens v. Kemp</i> , 846 F.2d 642 (11th Cir. 1988)	20
<i>Stone v. Powell</i> , 428 U.S. 465 (1976)	24
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	19
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	25, 26
<i>Thomas v. Kemp</i> , 796 F.2d 1322 (11th Cir. 1986)	20
<i>Tyler v. Kemp</i> , 755 F.2d 741 (11th Cir. 1985)	20
<i>United States v. New York Telephone Co.</i> , 434 U.S. 159 (1977)	8
<i>United States v. Shipp</i> , 203 U.S. 563 (1906)	14
<i>Vendo Co. v. Lektro-Vend Corp.</i> , 433 U.S. 623 (1977)	10
<i>Wainwright v. Witt</i> , 469 U.S. 412 (1985)	19
<i>West Virginia University Hosp. v. Casey</i> , 499 U.S. ___, 111 S.Ct. 1138 (1991)	10
<i>White v. Estelle</i> , 685 F.2d 927 (5th Cir. 1982)	20
<i>Withrow v. Williams</i> , 507 U.S. ___, 113 S.Ct. 1745 (1993)	25, 27
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	17

	<i>Page</i>
<i>Wright v. West</i> , 505 U.S. ___, 112 S.Ct. 2482 (1992)	23, 25, 27
 Statutes, Rules and Regulations	
28 U.S.C. §1331	12
28 U.S.C. §1738	9, 10
All-Writs Act	
28 U.S.C. §1651	3, 6, 7, 8, 9, 10, 11
Anti-Drug Abuse Act of 1988	
21 U.S.C. §848	<i>passim</i>
21 U.S.C. §848(q)(4)(B)	3, 6, 11
Anti-Injunction Act	
28 U.S.C. §2283	10
Habeas Corpus Act,	
28 U.S.C. §§2251-2255	1, 3, 11, 23, 25
28 U.S.C. §2241	6, 8
28 U.S.C. §2254	6, 8
28 U.S.C. §2251	3, 6, 7, 8, 10, 11
Rules Governing Section 2254 Cases	
Rule 9(b)	22
 Legislative History	
Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 1st Sess. 506-28 (July 17, 1991)	24

	<i>Page</i>
 Other Authorities	
American Bar Association Criminal Justice Section, Report to the House of Delegates, <i>reprinted in</i> 40 Am.U.L.Rev. 9 (1990)	18, 19
Faust, Rubenstein & Yackle, "The Great Writ in Action: Empirical Light on the Fed- eral Habeas Corpus Debate," 18 N.Y.U. Rev.L. & Soc. Change 637 (1990-91)	23
Judicial Conference of the United States, <i>Ad Hoc</i> Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (1989)	12, 13
Judicial Conference of the United States, <i>Ad Hoc</i> Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (1989)	12, 13
RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987)	8
Robson & Mello, "Ariadne's Provisions: A 'Clue of Thread' to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty," 76 Calif.L.Rev. 89 (1988)	18
WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993)	8
WEBSTER'S NEW WORLD DICTIONARY (original copyright 1957)	8

INTEREST OF *AMICUS*¹

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU steadfastly maintains its opposition to the use of capital punishment in the United States. Chief among our concerns are the due process and equal protection problems that are rampant in the administration of the death penalty. These concerns prompted the creation of the ACLU Capital Punishment Project which, among other things, is dedicated to eliminating denials of due process in capital cases and to educating the public about the serious moral and legal questions that the death penalty raises. The ACLU of Texas is a state affiliate of the national organization.

This case presents a series of issues of direct and longstanding concern to the ACLU, including: the importance of fair procedures if the death penalty is ever to be imposed; the importance of federal habeas review, especially in a death penalty context; and the significance of counsel for indigent petitioners who are otherwise unable to preserve and protect their constitutional rights within the criminal justice system.

The party briefs in this case focus on the narrow question of whether the Habeas Corpus Act and the All-Writs Act authorize a federal district court to stay a scheduled execution while counsel is appointed to prepare a formal habeas corpus petition. The ACLU agrees with petitioner that the answer to that question must be yes. In addition, however, this brief focuses on the central role played by federal habeas corpus in capital cases, and the crucial responsibilities of competent counsel in the representation of capital clients.

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

On November 15, 1989, the petitioner, Frank McFarland, was convicted of capital murder and sentenced to death in a Texas state court. On September 23, 1992, the Texas Court of Criminal appeals affirmed the conviction and sentence on direct review. On June 6, 1993, this Court denied *certiorari*. Two months later, on August 16, 1993, the trial judge issued an order fixing an execution date for September 23, 1993, then less than a month away. The following day, the trial court postponed the execution for an additional month -- to October 27, 1993.

At that time, the petitioner had not yet exercised his right to seek postconviction relief from the Texas state courts. Nor had he filed an application for a federal writ of habeas corpus. He had been represented by counsel at trial, on direct review, and in *certiorari* proceedings in this Court. Thereafter, however, counsel had abandoned him. McFarland had no lawyer when the trial court scheduled his execution and, except for the emergency assistance provided by the Texas Resource Center, he has had no lawyer since.

When his execution date was set, the petitioner literally took his life in his own hands. He initially filed several *pro se* motions in the Texas state courts, seeking a stay of execution to allow time for a lawyer to be secured to represent him. When those efforts were unsuccessful, he wrote to the United States District Court for the Northern District of Texas, expressing his desire to seek federal habeas corpus relief and requesting a stay and the appointment of counsel to make that possible.² The district court denied a stay, declined to appoint

² McFarland acknowledged that he had obtained help from the Texas Resource Center in the preparation of this request, but explained that the Resource Center could not assume formal responsibility for his case because of the overflow of death penalty cases in Texas.

counsel, and refused even to issue a certificate of probable cause to permit the petitioner to appeal. When the prisoner renewed his request for a certificate before the Fifth Circuit, a panel of that court, too, denied relief and further held that the district court lacked authority to stay an execution in advance of a formal habeas corpus petition. *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993).

The Fifth Circuit decision on the question of judicial authority conflicted with a previous Ninth Circuit decision on the same point. *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992). This Court granted *certiorari*.

SUMMARY OF ARGUMENT

Contrary to the view of the Fifth Circuit below, two federal statutes clearly authorize a district court to issue a stay of execution in advance of a formal habeas corpus petition. First, the Habeas Corpus Act, 28 U.S.C. §2251, explicitly authorizes a stay when a habeas "proceeding" is "pending" and the most natural understanding of the term "pending" in these circumstances would embrace a request by a *pro se* petitioner for the appointment of counsel to help seek habeas relief. Second, the All-Writs Act, 28 U.S.C. §1651, empowers a district court to issue a stay in order to protect its prospective jurisdiction in habeas corpus.

Any doubts about the proper construction of §2251 and §1651 are resolved by a provision of the Anti-Drug Abuse Act of 1988, 21 U.S.C. §848(q)(4)(B), which obligates the federal government to provide an indigent death row prisoner with appointed counsel in a federal habeas corpus proceeding. In cumulative effect, all three statutes together can only be read to mean that a district court has authority to prevent an execution so that a potential habeas applicant can be represented by a lawyer for purposes of a federal habeas attack on a death sentence.

The simplest and most straightforward way to accomplish that result is for the district court to stay the execution date, where appropriate, to allow time for the appointment of counsel and the preparation of a professionally competent habeas corpus petition. In the alternative, a district court may either treat a prisoner's *pro se* request for a stay and counsel as a petition for habeas corpus relief or invite the prisoner to file a place-holding petition for the writ.

If this Court prefers one of those alternatives, however, it must instruct the lower courts that such a petition-for-convenience is not to be treated as a formal petition presenting the merits of the prisoner's claims. Specifically, a district court must postpone the application of any rules calling for expedited consideration of habeas petitions in capital cases, the ordinary procedural rules governing habeas petitions (e.g., the exhaustion and procedural default doctrines), and any threshold examination of the merits. All those matters should be taken up only after counsel has been appointed and has had an opportunity to file a meaningful federal application presenting and supporting all nonfrivolous claims.

If client and counsel conclude that it is best to pursue relief in state court before filing a federal petition, counsel will presumably seek a stay from the state courts. If no such stay is forthcoming, however, the federal district court's stay must remain in effect to ensure that the district court's prospective jurisdiction to entertain a timely federal petition is preserved. If client and counsel choose to file a federal petition without further recourse to the state courts, the stay must remain in place during the proceedings on that petition. The usual procedural rules governing formal applications for federal habeas corpus relief will then be applicable to the petition that counsel files on the prisoner's behalf.

In either event, a death row inmate should not be required to go it alone. The unique importance of com-

petent, professional representation in death penalty cases has been recognized by this Court for more than a half-century. See *Powell v. Alabama*, 287 U.S. 45 (1932). And as Congress recognized when it enacted §848, competent counsel is equally essential when a death row inmate seeks federal habeas relief. This is especially true given the procedural rules that this Court has imposed on habeas corpus in recent years. An uncounseled petitioner's failure to comply with those rules can often be fatal.

The jurisdictional context in which this case arises should not obscure what is really at stake. The success rate for habeas petitions in capital cases is approximately 40%, an extraordinarily high figure that attests to the importance of habeas corpus in the machinery of American justice. This Court, like Congress, has often acknowledged as much. Thus, even when enforcing new procedural rules, the Court has never questioned the clear intent of Congress to give the district courts authority to adjudicate the merits of properly preserved and presented federal claims.

The denial of a district court's authority to issue a pre-petition stay in a proper case would, however, undermine the substance of the federal habeas jurisdiction. For in the absence of a stay and competent counsel, a death row inmate cannot hope either to clear the procedural barriers to the federal forum or to develop and present what may be meritorious constitutional claims.

If the constitutional limits on capital punishment are to be effectively enforced in federal habeas corpus with the assistance of competent lawyers for indigents as Congress has prescribed, then it must follow that the federal district courts have authority to stay executions when necessary to summon counsel to service and to allow counsel actually to render service -- to prisoners on death row, to the federal courts, and to the Constitution of the United States.

ARGUMENT

I. A DISTRICT COURT HAS AUTHORITY TO STAY THE EXECUTION OF AN UNREPRESENTED STATE PRISONER DURING THE TIME REQUIRED FOR THE COURT TO APPOINT COUNSEL AND FOR COUNSEL TO PREPARE A MEANINGFUL HABEAS CORPUS PETITION

The district court's authority to stay a prisoner's execution in the circumstances of this case rests on three related federal statutes. First, the Habeas Corpus Act, specifically 28 U.S.C. §§2241, 2254, and 2251, establishes the court's subject matter jurisdiction in habeas corpus and expressly provides for stays to effectuate that jurisdiction. Next, the All-Writs Act, 28 U.S.C. §1651, authorizes the court to issue all writs "necessary or appropriate in aid of [its] respective jurisdictions and agreeable to the usages and principles of law." Finally, a provision of the Anti-Drug Abuse Act of 1988, 21 U.S.C. §848 (q)(4)(B), entitles an indigent state prisoner to the appointment of "one or more attorneys" for purposes of a habeas corpus proceeding pursuant to §2254 "seeking to set aside a death sentence."³

³ This brief does not explore the petitioner's arguments that he is constitutionally entitled to appointed counsel in this death penalty case and that the state courts of Texas violated the Suspension Clause by failing to stay the petitioner's execution in order to permit at least one postconviction petition to be prepared and heard.

In our view, however, it would be unconstitutional for Texas to put the petitioner to death without pausing to consider whether appointed counsel might develop meritorious claims that such an execution would violate federal law. Cf. *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983) (stating that a death sentence "cannot begin to be carried out . . . while substantial legal issues remain outstanding"); *Murray v. Giaratano*, 492 U.S. 1, 14-15 (1989) (Kennedy & O'Connor, JJ., concurring) (expressing an unwillingness to hold that Virginia must appoint

(continued...)

These statutes plainly contemplate that a district court has power to maintain the *status quo* long enough to make the system work -- that is, long enough to secure a lawyer to represent a death row prisoner and to give that lawyer sufficient time to investigate the case, marshal claims and supporting facts, and prepare and file a meaningful petition for the court's examination. To read the statutes otherwise is to read them to produce an absurd result.

A. The Plain Meaning of §2251 and §1651

The Court need go no further than the bare language of §2251 and §1651 to conclude that the district court in this case had all the authority necessary to stay

³ (...continued)

counsel to represent indigent death row prisoners in state postconviction proceedings -- but only where the record showed that the less sweeping system that state employed had managed to produce a lawyer for everyone who requested one).

The parties in this case do not explicitly ask the Court to revisit the issue in *Giarratano*, 492 U.S. 1. This brief, too, eschews a forthright assault on the decision in that case, namely that a state has no absolute duty to provide indigent death row prisoners with lawyers for purposes of state postconviction proceedings. This case does, however, illuminate the calamitous consequences of the *Giarratano* decision in states, like Texas, which do not provide lawyers in state proceedings.

The Court must, however, approach the statutory construction question at bar within the constitutional context from which it arises. Four members of this Court dissented from the plurality's judgment in *Giarratano* and would have held that "it is fundamentally unfair to require an indigent death row inmate to *initiate* collateral review without counsel's guiding hand." *Id.* at 20 (Stevens, J., dissenting) (joined by Blackmun, Brennan & Marshall, JJ.) (emphasis added). Federal habeas corpus is such a "collateral" remedy, and if Congress had not established a right to counsel in federal court via §848 there would be a powerful argument that a district court would be constitutionally obliged to appoint one anyway -- at least in a case like this one, in which the relevant state has failed to supply counsel for state postconviction proceedings.

McFarland's execution in advance of a formal application for habeas corpus relief.

By the terms of §2251, a federal judge or justice "before whom a habeas corpus proceeding is pending" may stay "any proceeding against the person detained . . . under the authority of any state" The circuit court held that a "habeas corpus proceeding" is "pending" only after a formal petition is filed. That construction defies a much more natural and sensible reading, namely that a "habeas corpus proceeding" is "pending" when a *pro se* prisoner brings his or her allegedly unconstitutional custody to the district court's attention and announces a genuine intention to seek habeas relief.⁴

The point of a stay of execution pursuant to §2251 is to protect the district court's ability to exercise its habeas jurisdiction under §§2241 and 2254. As long as a prisoner clearly indicates an intention to file a formal habeas petition, there is no basis for barring a stay prior to such a petition while permitting a stay immediately thereafter. When a case is in either posture, the same need for a federal stay obtains.

By the terms of §1651, a federal court has authority to issue all writs "appropriate in aid of [its] . . . jurisdiction[]." Here, too, the plain purpose is to allow a federal court to issue ancillary orders that make it possible to exercise some independent basis of subject matter jurisdiction -- like habeas corpus.⁵ In some cases, such writs

⁴ The term "pending" means not only "during," but also "while awaiting," and is synonymous with "imminent" or "impending." WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993). Accord RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987); WEBSTER'S NEW WORLD DICTIONARY (original copyright 1957).

⁵ In *United States v. New York Telephone Co.*, 434 U.S. 159, 188 n.19 (1977), Justice Stevens recognized that §1651 is not a freestanding jurisdictional statute, but rather piggybacks on some independent juris-

(continued...)

may issue after a formal proceeding has commenced in federal court. In other cases, however, a federal court may act before a formal complaint is filed in order to preserve its ability to exercise jurisdiction in due course. See *FTC v. Dean Foods*, 384 U.S. 597, 603 (1966) (holding that a court of appeals can issue the writ of mandamus to protect its potential jurisdiction to review the actions of an administrative agency); *McClellan v. Carland*, 217 U.S. 268, 280 (1910) (holding that an appellate court can issue the writ of mandamus to protect its potential jurisdiction to review the judgment of a lower court).⁶

It makes no difference that the federal courts most often rely on §1651 to protect a prospective jurisdiction in the form of an appeal from the judgment of a lower federal court or federal agency. The federal courts do not *have* any potential appellate jurisdiction with respect to matters in state court and therefore have no occasion to protect any such jurisdiction.⁷ The federal courts do, however, have jurisdiction to entertain habeas corpus applications after prisoners' federal claims have been rejected by the state courts and thus may well need to is-

⁵ (...continued)

ditional base. That is quite correct. Yet the independent jurisdictional ground may be either currently engaged or prospective.

⁶ In other contexts, the Fifth Circuit itself has recognized this well-settled understanding of the Act. E.g., *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 n.19 (5th Cir. 1978) (acknowledging that the All-Writs Act authorizes a court to preserve the status quo in order to be in a position to exercise jurisdiction later). The petitioner cites a host of other circuit decisions to the same effect.

⁷ See 28 U.S.C. §1738 (normally obligating a federal court to give preclusive effect to a previous state court judgment); *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923) (confirming that the lower federal courts have no appellate jurisdiction over state court decisions).

sue stays to protect that jurisdiction from disruptive state action.⁸

As the petitioner points out, this Court's own practice of staying executions so that prisoners can file formal *certiorari* petitions reflects the settled understanding that a federal court may forestall a state execution in aid of prospective federal jurisdiction.⁹

B. The Cumulative Effect of §2251, §1651, and §848

If the Court finds ambiguity in §2251 and §1651, it must read those statutes "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law . . . [and thus] to make sense rather than nonsense out of the *corpus juris*." *West Virginia University Hosp. v. Casey*, 499 U.S. ___, ___, 111 S.Ct. 1138, 1148 (1991).

In this instance, the Court can scarcely read §2251 and §1651 to mean something apart from §848 that they cannot possibly be read to mean if considered in light of the right-to-counsel statute. Congress has decided that the federal government should provide indigent death row prisoners with lawyers to represent them in federal habeas corpus proceedings. It is untenable to propose,

⁸ See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 n.27 (1982) (confirming that habeas corpus is an express statutory exception to §1738); *Brown v. Allen*, 344 U.S. 443 (1953) (confirming the federal courts' authority to reexamine prisoners' federal claims as a sequel to state court litigation).

⁹ The Anti-Injunction Act, 28 U.S.C. §2283, which often restricts the availability of federal injunctions against state proceedings, expressly accommodates the All-Writs Act by recognizing an exception for "an injunction to stay proceedings in a State court . . . where necessary in aid of [a federal court's] jurisdiction" Cf. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 640 (1977) (recognizing that §2251 is an express statutory exception to §2283).

then, that prisoners may be denied attorneys anyway -- because the federal courts have no power to keep prisoners alive long enough to enjoy the benefits of professional counsel. It is equally untenable to propose that a prisoner who is fortunate enough to survive must still proceed *pro se*, despite §848 -- because a formal petition must be docketed *before* a district court can issue an order appointing a lawyer. Certainly, it is inconceivable that §848 commands the appointment of counsel only after a formal petition has been filed, when it is too late for a lawyer actually to *represent* the client by preparing the case for federal adjudication.¹⁰

Once a formal petition is filed, the die is cast and the best of lawyers can often do little to affect the proceedings. The prisoner's *pro se* errors may already have frustrated any meaningful day in federal court that might otherwise have been possible. In Texas today, a federal district court can deny a stay of execution and dismiss an *initial* habeas corpus petition on the merits within the space of a single day.¹¹

It is no answer, of course, that §848 is a comparatively new enactment, while §2251 and §1651 have been in place for a very long time. Once again, the Court's responsibility is to construe all three statutes as part of a consistent whole. It is pointless to guess at whether the Congresses that put the Habeas Corpus Act and the All-Writs Act on the federal statute books "intended" at the

¹⁰ In this vein, §848(q)(4)(B) expressly provides that appointed counsel is entitled to "investigative, expert, or other" support services. That plainly contemplates that counsel is to assist in the development of the prisoner's claims, not simply to appear in court once a *pro se* application has been filed.

¹¹ E.g., *Gosch v. Collins*, No. SA-93-CA-731 (W.D.Tex. Sept. 15, 1993), *aff'd*, 8 F.3d 20 (5th Cir. 1993), *petition for cert. filed*. See pp.15-16, *infra* (discussing the possibility that newly appointed counsel might amend a *pro se* application).

time to authorize the kind of stay that is essential in this case if §848 is to have any effect.¹² All three statutes are now part of the aggregate of federal statute law, and this Court must make sense of them as a unit.¹³

After an examination of the statutory system in 1989, Justice Powell's *ad hoc* committee of the Judicial Conference concluded that the working assumption behind the habeas system that Congress has created should be simply this:

[E]very state prisoner under capital sentence should have one opportunity for full state and federal post-conviction review before being subject to execution.¹⁴

In aid of this general policy, the Powell Committee offered a number of recommendations. One of the most important (and least controversial) was that a federal district court "that *would* have jurisdiction" over a habeas corpus application on behalf of a death row prisoner should automatically stay the prisoner's execution as

¹² See *Pennsylvania v. Union Gas*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring and dissenting) (explaining that the task is not to identify the legislative "intent" that a particular Congress had in mind when it enacted a particular statute, but to "give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times").

¹³ In *Califano v. Sanders*, 430 U.S. 99 (1977), the Court held that §10 of the Administrative Procedure Act does not constitute an independent basis of subject matter jurisdiction. There were arguments both ways, but the Court found it persuasive that a recent amendment to 28 U.S.C. §1331 would be undercut if the APA were read to be jurisdictional in itself. If a more recent enactment can weaken an argument that a longstanding statute is jurisdictional, a recent enactment can equally strengthen such an argument.

¹⁴ Judicial Conference of the United States, *Ad Hoc Committee on Federal Habeas Corpus in Capital Cases*, Committee Report and Proposal 15 (1989) (emphasis added).

soon as the prisoner seeks such a stay after an execution date is fixed.¹⁵ Importantly, the Powell Committee did not suggest that new legislation would be required to empower a district court to issue a stay of execution in advance of a formal habeas petition.¹⁶

There is no basis for referring in this case to the Court's general practice of reading jurisdictional statutes narrowly, even when justice would better be served by a more generous construction. *E.g.*, *Christianson v. Colt*, 486 U.S. 800 (1988). The reason for that prudential policy is that the federal courts have only the power that Congress confers on them and should not risk exercising authority that Congress has not genuinely granted. In this case, however, there is no doubt that the federal courts have jurisdiction in habeas corpus. That jurisdic-

¹⁵ See n.14, *supra* at 13-14 (emphasis added). Within the Powell Committee's program, a district court would have this duty (and a variety of others) if the state concerned first triggered the application of special death penalty provisions by appointing counsel for purposes of state postconviction proceedings. See *id.* at 7:

[T]he [recommended] statute provides for an automatic stay of execution, which is to remain in place until federal habeas proceedings are completed, or until the prisoner has failed to file a petition within the allotted time. This automatic stay ensures that claims need not be evaluated under the time pressure of a scheduled execution. It should substantially eliminate the rushed litigation over stay motions that is troubling for both litigants and the judiciary.

¹⁶ The Committee said nothing about jurisdiction and quite clearly presupposed the necessary baseline authority to issue stays. The only innovation the Committee purported to advance in its recommendation on stays was that the district courts should issue them routinely in all cases -- whether counsel is involved or not, and without any threshold consideration of facial merit. Other aspects of the Committee's plan plainly would require legislation, *e.g.*, new filing deadlines for capital habeas petitions. When, accordingly, the Committee put all its recommendations together in a single package, it was efficient to present that package in the form of a legislative bill.

tion is clear and settled.¹⁷

A pre-petition stay need not delay the filing and processing of a formal federal habeas corpus application. The district court can specify the time it will require to identify and appoint counsel under §848. Once counsel is involved, the court can specify the time it will allow for the investigation and preparation of the prisoner's claims. Cases in which stays are issued will not, then, disappear in the interstices of the system. By contrast, once the federal court issues a stay order, it can assert control of a case, track its progress, and ensure that appointed counsel develops and presents the prisoner's claims as soon as practicable. In other circuits, district courts now stay executions in these circumstances only for fixed periods of time and then monitor events to avoid abuses. *E.g., Brown v. Vasquez*, 952 F.2d at 1165. The district courts in the Fifth Circuit can do the same.

C. Alternatives to a Pre-Petition Stay

A stay in advance of a formal habeas corpus petition is not the only answer in cases of this kind. Alternatively, a district court can either treat a prisoner's request for counsel and a stay as a formal habeas petition,¹⁸ or (quickly) invite the prisoner to submit a pleading that is formally styled a petition for the writ.¹⁹ Either way, the

¹⁷ The norm of narrow construction is primarily invoked when jurisdiction over parties, rather than claims, is in issue. *E.g., Finley v. United States*, 490 U.S. 545 (1989). Here, of course, Texas is contending against jurisdiction over *federal claims*.

¹⁸ See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (admonishing the district courts to hold *pro se* papers to "less stringent standards than formal pleadings drafted by lawyers").

¹⁹ Cf. *United States v. Shipp*, 203 U.S. 563, 573 (1906) (Holmes, J.) (recognizing that a federal court always has power to entertain a matter in order to determine whether it has some basis of subject matter jurisdiction).

court would clearly have authority to issue a stay and any argument to the contrary would melt away.

If, however, this Court chooses one of these alternatives, it is vital that it be clear that such a petition-for-convenience cannot be subjected to the panoply of procedural rules that typically bear on genuine habeas applications. It would be senseless to *treat* a stay request as something it is not (a substantive habeas petition) merely to gain some formalistic reassurance of the court's jurisdiction, and then to *demand* of such a petition what it cannot reasonably supply (an effective presentation of all the prisoner's nonfrivolous claims).²⁰

Instead, if the Court prefers one of these routes, it must make it plain that such a petition would be open to liberal amendment by appointed counsel and that amendments would not run afoul of the ordinary rules governing successive habeas applications.²¹ In effect, the

²⁰ Tragically, this is precisely what can now occur in the Fifth Circuit. *E.g., Gosch v. Collins*, *supra* n.11.

²¹ *McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454 (1991). The point of the *McCleskey* rules is to give prisoners and their lawyers a strong incentive to aggregate all claims in a single application for federal relief. Ever since *McCleskey* was decided, lawyers have known that they must scour the state record and employ any other devices at their disposal to isolate all nonfrivolous claims to be included in the prisoner's first (and potentially last) federal habeas petition. See *Coleman v. Vasquez*, 771 F.Supp. 300, 302 (N.D.Cal. 1991) (reviewing the investigative work that *McCleskey* demands of prisoners and their lawyers). If, however, a would-be petitioner has no lawyer to do that crucial work, the incentive structure established in *McCleskey* breaks down.

If prisoners like McFarland are forced to file *pro se*, they will often fail to articulate all the claims open to them and thus run squarely into *McCleskey*. If, then, claims raised by way of amendment are treated as successive, something has to give -- either the rigidity of the forfeitures that *McCleskey* envisions or the federal interest in the adjudication of a prisoner's constitutional claims. If it is the latter, then the federal judicial machinery that Congress has established to enforce

(continued...)

prisoner's own *pro se* filing must be considered only a place-keeper -- to be displaced entirely by a professionally prepared petition filed later by appointed counsel.

Specifically, if the Court chooses one of these alternative routes, it should give district courts three explicit instructions. First, they must defer the application of any local rules they may have for the summary examination of habeas petitions on an expedited basis until counsel has been able to file a meaningful application on the prisoner's behalf. This Court has approved truncated procedures in capital cases only with the understanding that the prisoners concerned have competent counsel to assist them. See *Barefoot v. Estelle*, 463 U.S. 880. That, of course, would not be the case if a district court treated a *pro se* request for counsel and a stay as substantive application for habeas relief.

Second, the district courts should similarly defer any appraisal of the prisoner's compliance with the procedural requirements in habeas corpus -- for example, the exhaustion doctrine and the rules governing procedural default in state court. One of the chief objectives of providing counsel to assist in the preparation stage is to make it possible for prisoners to comply with those doctrines. It only makes sense, then, that a district court should withhold judgment until an appointed lawyer has done his or her job.

Third, the district courts certainly must postpone any consideration of the facial merits of a prisoner's substantive claims until counsel has tendered those claims in a new or amended petition. It would be absurd for a district court to ensure its jurisdiction to pass on constitutional claims by seizing upon the first piece of paper a

²¹ (...continued)

the Bill of Rights in capital cases will be frustrated by a futile system of penalties, imposed on state prisoners for failing to do what they have no genuine capacity to do.

pro se prisoner sends along and then, in the next breath, to dismiss on the merits because that piece of paper fails to allege a substantial constitutional violation.²² A *pro se* request for counsel and a stay is not meant to advance substantive claims and can scarcely be faulted for failing to do so.²³

II. A PRE-PETITION STAY IS ESSENTIAL TO THE CONGRESSIONALLY PRESCRIBED POLICY OF PERMITTING A STATE PRISONER TO ATTACK A DEATH SENTENCE IN FEDERAL HABEAS CORPUS WITH THE ASSISTANCE OF A COMPETENT LAWYER

Since the Court ended the moratorium on capital punishment in 1976, the Court has interpreted the Eighth and Fourteenth Amendments to place serious substantive and procedural limitations on the content and implementation of state death penalty statutes.²⁴

²² Thus *Autry v. Estelle*, 464 U.S. 1 (1983), is inapplicable to such an initial filing by a *pro se* prisoner. In that case, there was no question that the prisoner was represented by competent counsel, and this Court could sensibly examine the substance of the allegations to decide whether *certiorari* might conceivably be granted.

²³ Similarly, if the Court were to hold that a district court may appoint counsel as soon as a prisoner files a request pursuant to §848 and that counsel should immediately file a habeas petition, that petition should not be subject to the same expedited procedures and the same threshold examination for compliance with procedural rules and substantive merit that would apply to a petition filed after counsel has had a fair opportunity to perform his or her function as outlined above. A *pro forma* petition, irrespective of its label and author, cannot sensibly be held to the standards this Court has established for genuine applications for habeas relief advancing particularized federal claims. Cf. *Gosch v. Collins*, *supra* n.11 (illustrating the unfairness of any such procedure).

²⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Without those limitations, sentencing authorities would exercise uncontrolled discretion and fail to take account of a defendant's peculiar circumstances. So long as the death penalty retains constitutional approval in any form, its use must be subject to guidelines that safeguard the values served by the ban on cruel and unusual punishment. In consequence, however, death penalty law is extraordinarily complex and demanding.

Congress has recognized the complexities of death penalty doctrine and the consequent need for effective machinery to enforce it. And Congress has responded by opening the federal habeas courts for the adjudication of prisoners' federal claims and by providing for publicly funded lawyers to make habeas litigation meaningful. Similarly, this Court has frequently recognized the absolute necessity of skilled assistance in capital cases. *E.g.*, *Murray v. Giarratano*, 492 U.S. at 14 (Kennedy & O'Connor, JJ., concurring)(explaining that the complexity of death penalty jurisprudence "makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law").

To represent a capital client in habeas corpus, a lawyer must probe the intricacies of a whole series of doctrines -- among them the Eighth Amendment principles governing capital trials and sentencing proceedings and the rules governing the effect of previous proceedings in state court.²⁵ Substantive Eighth Amendment standards are extremely complex and dynamic, presenting even an experienced member of the criminal defense bar with a

²⁵ See generally American Bar Association Criminal Justice Section, Report to the House of Delegates, *reprinted in* 40 Am.U.L.Rev. 9, 55 (1990); Robson & Mello, "Ariadne's Provisions: A 'Clue of Thread' to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty," 76 Calif.L.Rev. 89 (1988).

significant professional challenge.²⁶ The "learning curve" is all the more significant for a volunteer attorney, who may have experience only in civil litigation and thus be unfamiliar even with general principles of criminal procedure. Certainly a *pro se* prisoner is typically unable to master the substantive law affecting his or her sentence. The procedural prerequisites for a successful habeas petition are also intricate.²⁷ A lawyer can explore them only with time and effort; a *pro se* death row prisoner cannot hope to pursue them at all.²⁸

To grasp the demands of counsel's responsibilities, one need only consider the tasks a lawyer faces in turn. Initially upon appointment under §848, counsel must consult with the new client and the attorneys who represented him or her previously, study the record of the proceedings in state court and all existing briefs, memoranda, and judicial opinions touching the case, and explore the federal claims previously advanced on the client's behalf.

²⁶ This Court has often developed idiosyncratic or hybrid principles for application only when the death penalty is invoked. *E.g.*, *Wainwright v. Witt*, 469 U.S. 412, 414 (1985)(jury selection); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(argument to the jury); *Spaziano v. Florida*, 468 U.S. 447, 464-65 (1984)(sentencing responsibility).

²⁷ *E.g.*, ABA Report, *supra* at 29-30 n.49.

²⁸ In many cases, moreover, the effectiveness of previous counsel must be evaluated -- a daunting affair, even for professionals. Under *Strickland v. Washington*, 466 U.S. 668 (1984), it is necessary to determine whether a lawyer's performance "fell below an objective standard of reasonableness," *id.* at 688, and, if so, whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A death row prisoner acting alone simply cannot develop arguments with respect to these intrinsically professional matters. See *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986)(acknowledging that a prisoner may appreciate a lawyer's shortcomings only after consulting a different attorney).

In addition, counsel must investigate any basis there may be for raising other, additional federal issues. For this, counsel cannot rely on the record in state court, but must independently investigate factual circumstances that may reveal meritorious federal claims.²⁹ Death row prisoners frequently obtain relief because new lawyers, appointed after direct appeal is complete, have developed extra-record evidence of constitutional error.³⁰ In some instances, habeas counsel have uncovered evidence raising serious doubts about death row inmates' factual guilt.³¹ In any event, a competent professional can file a

²⁹ Cf. *Penson v. Ohio*, 488 U.S. 75, 82 n.5 (1988) (recognizing that the record at trial in state court may not reveal all the irregularities that may support claims for relief); *Amadeo v. Zant*, 486 U.S. 214 (1988) (recognizing that a prisoner had been unaware of a race discrimination claim until habeas counsel uncovered it by examining the evidence in another lawsuit).

³⁰ At the very least, counsel must determine whether state authorities failed to disclose exculpatory material, e.g., *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988); *Lewis v. Lane*, 832 F.2d 1446 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988); *Bowen v. Maynard*, 799 F.2d 593 (10th Cir.), cert. denied, 479 U.S. 962 (1986); *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986); *Chaney v. Brown*, 730 F.2d 1334 (10th Cir.), cert. denied, 469 U.S. 1090 (1984), and whether trial counsel turned up all the defenses and claims open to the accused. E.g., *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991); *Pilchak v. Camper*, 935 F.2d 145 (8th Cir. 1991); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991); *Chambers v. Armontrout*, 885 F.2d 1318 (8th Cir. 1989); *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988); *Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988); *Smith v. Wainwright*, 799 F.2d 1442 (11th Cir. 1986); *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986); *Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *House v. Balkcom*, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870 (1984). Most federal decisions holding trial counsel to have been constitutionally ineffective have been based on recently discovered evidence. E.g., *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988); *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987); *Thomas v. Kemp*, 796 F.2d 1322 (11th Cir. 1986).

³¹ E.g., *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985); *White v. Estelle*, (continued...)

petition only after a thorough search for all nonfrivolous claims available to the client.

Next, counsel must assess the procedural posture of any potentially meritorious claims that come to light and explain to the client the avenues for pursuing those claims. In some instances, further recourse to the state courts may be advisable;³² in others, an immediate habeas application in federal court may be appropriate.³³ Finally, counsel must give the client the best professional advice he or she can offer -- including an assessment of the risks of choosing any particular course of action.³⁴

³¹ (...continued)
685 F.2d 927 (5th Cir. 1982); *Freeman v. Georgia*, 599 F.2d 65 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980); *McDowell v. Dixon*, 858 F.2d 945.

³² For example, counsel may conclude that state remedies have not been exhausted with respect to a claim and that there is some currently available mechanism by which to present the claim to the state courts. If a claim was not, but should have been, raised in state court at an earlier time, it is possible that the state courts would now refuse to consider it in light of previous counsel's procedural default. Nevertheless, the state courts may be willing to overlook such a default and reach the merits after all -- perhaps in a new state postconviction procedure. Counsel must explore these possibilities and contingencies and advise the client accordingly.

³³ For example, counsel may conclude that state remedies have been exhausted or that, if previous counsel's procedural default did or would bar further litigation in state court, the federal court should either find the state's procedural ground of decision inadequate to cut off federal habeas corpus or should find the "cause" and "prejudice" necessary to warrant federal adjudication on the merits notwithstanding that procedural ground. Alternatively, counsel may reach an understanding with opposing counsel to waive state defenses on the basis of the exhaustion or procedural default doctrines.

³⁴ For example, counsel must explain to the prisoner that a decision to go forward immediately in federal court with claims regarding which state remedies have been exhausted, and to postpone the presentation of claims regarding which state remedies have not been exhausted, is (continued...)

If the prisoner and counsel decide to seek relief from the state courts, counsel has a professional obligation either to handle that matter for the prisoner or to see that alternative representation is secured.³⁵ If and when such a state petition is filed, the appropriate state court will presumably issue a stay of execution for its own purposes.³⁶ If, however, the state court refuses, the federal district court's previous stay must remain in effect -- in order to protect that court's potential jurisdiction to consider the prisoner's federal claims when they are presented in a formal federal habeas petition.

If the prisoner and counsel decide to file an immediate federal habeas corpus application, counsel will prepare that petition as soon as possible, file it, and represent the prisoner in all further proceedings with respect to it. Such a formal habeas corpus petition will, of course, set forth the prisoner's claims with specificity and thus will be subject to ordinary judicial consideration for form and substance.

³⁴ (...continued)

to "risk" forfeiture of currently "unexhausted" claims in later federal proceedings. *Rose v. Lundy*, 455 U.S. 509, 520-21 (1982). See Rule 9(b), Rules Governing Section 2254 Cases; *McCleskey v. Zant*, 111 S.Ct. 1454.

³⁵ There is no occasion in this case to explore the extent to which §848 commits the federal government to compensate counsel for activities on the prisoner's behalf that are focused on obtaining relief from the state courts. We would hope that the state of Texas would underwrite such activities but, in any case, counsel's professional responsibilities exist apart from any promise of reimbursement.

³⁶ The prisoner in this case was unable to obtain a stay from the Texas courts when he applied *pro se*. We trust that the state courts would be more receptive to a professionally drafted petition that carefully articulates and supports potentially meritorious federal grounds for relief.

III. THE DENIAL OF A STAY WOULD UNDERMINE THE DISTRICT COURT'S JURISDICTION TO DETERMINE THE MERITS OF PROPERLY PRESENTED CLAIMS

The denial of a stay in a case like this would undercut the very substance of the federal courts' jurisdiction in habeas corpus. The proper understanding of older cases has been debated. Yet all sides agree that for the forty years since *Brown v. Allen*, 344 U.S. 443, this Court has read the Habeas Corpus Act to authorize the district courts to examine federal claims after those claims have been rejected in state court. *Wright v. West*, 505 U.S. ___, ___, 112 S.Ct. 2482, 2488-89 (1992)(opinion for the Court by Thomas, J.).³⁷

The importance of habeas corpus in capital cases can be demonstrated quantitatively. The available statistics are incomplete, but it is widely agreed that the success rate in noncapital cases is quite low, perhaps 3-4%.³⁸ In death penalty cases, by contrast, the success rate is quite high. Between 1976 and 1991, the federal courts found constitutional error warranting habeas relief in approximately 40% of the capital cases they considered. Stated differently, during this period, federal habeas corpus prevented nearly 150 people from being executed on the basis of constitutionally flawed convictions or

³⁷ In recent years, this Court has found habeas corpus relief essential to vindicate the rights of prisoners in a variety of circumstances. *E.g.*, *Maynard v. Cartwright*, 486 U.S. 356 (1988)(prosecution under a vague statute); *Amadeo v. Zant*, 486 U.S. 214 (racial discrimination); *Hitchcock v. Dugger*, 481 U.S. 393 (1987)(misinstructed jury); *Francis v. Franklin*, 471 U.S. 307 (1985)(misstatement of the burden of proof); *Estelle v. Smith*, 451 U.S. 454 (1981)(violation of the right to counsel).

³⁸ See Faust, Rubenstein & Yackle, "The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate," 18 N.Y.U. Rev. L. & Soc. Change 637, 681 (1990-91)(providing data from 1973-75 and 1979-81 in the Southern District of New York).

death sentences.³⁹ These figures demonstrate that constitutional errors occur frequently in capital prosecutions, that the state courts do not routinely detect and cure those errors, and that, accordingly, federal habeas corpus is often the indispensable means by which federal constitutional standards bearing on the death penalty are enforced in the current framework.

To be sure, this Court has recently recognized a variety of procedural rules governing the way in which prisoners must preserve federal claims in state court and then present them in federal court in an efficient manner. Prisoners who fail to observe those procedural rules typically forfeit the access they would otherwise have had to obtain federal adjudication of their federal claims. In *Rose v. Lundy*, 455 U.S. 509, for example, the Court tightened the standards for the exhaustion of state remedies. In *Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546 (1991), the Court elaborated the rules that typically bar federal consideration of any claim a prisoner failed to raise in state court at the time and in the manner prescribed by state law. And, in *McCleskey v. Zant*, 111 S.Ct. 1454, the Court invoked those same rules to force prisoners to join all their claims in a single federal petition. Decisions like *Rose*, *Coleman*, and *McCleskey* establish procedural barriers having the effect, if not the purpose, of limiting the availability of federal habeas corpus for state prisoners.

It is crucial to understand, however, that this Court has repeatedly refused to restrict the substantive scope of the federal courts' habeas jurisdiction.⁴⁰ Once a state

³⁹ Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 1st Sess. 506-28 (July 17, 1991)(appendix to statement of John J. Curtin, Jr., President of the American Bar Association).

⁴⁰ *Stone v. Powell*, 428 U.S. 465 (1976), largely barred the federal ha-
(continued...)

prisoner satisfies door-keeping procedural rules, the Court has acknowledged the federal courts' longstanding authority under the Habeas Corpus Act to exercise independent judgment on the merits. In *McCleskey*, 111 S.Ct. 1454, for example, even as the Court raised yet again the procedural barriers to the federal forum, the Court carefully reconfirmed that once a petitioner presents a federal district court with a claim "in the proper procedural manner," the district court must independently determine "all dispositive constitutional claims." *Id.* at 1462.⁴¹

⁴⁰ (...continued)

beas courts from enforcing the Fourth Amendment Exclusionary Rule. That decision, however, was an interpretation of the Exclusionary Rule itself, not the Habeas Corpus Act. *Withrow v. Williams*, 507 U.S. ___, 113 S.Ct. 1745, 1750 (1993).

⁴¹ The line of decisions beginning with *Teague v. Lane*, 489 U.S. 288 (1989), has been justified in the same way. The ACLU has warned that the Court's expansive definition of "new rules" for "retroactivity" purposes shades into a general rule of deference to erroneous (but "reasonable") state court decisions applying constitutional law to the facts of particular cases. E.g., Brief *Amicus Curiae* on Behalf of the ACLU and the ACLU of Illinois, in *Gilmore v. Taylor*, 508 U.S. ___, 113 S.Ct. 2112 (1993). This Court has recognized, however, that in a long stream of authoritative decisions, it has become "settled" that "mixed" constitutional questions are "subject to plenary federal review" on habeas corpus. *Wright v. West*, 112 S.Ct. at 2489 (opinion for the Court by Thomas, J.)(relying on *Brown v. Allen*, 344 U.S. 443, and quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)(opinion for the Court by O'Connor, J.)).

Accordingly, the *Teague* cases do not establish any deferential "standard of review" by which the federal habeas courts examine state court judgments regarding federal rights and thus do nothing to undermine the Court's longstanding interpretation of the Habeas Corpus Act to command fresh, independent federal judgment on federal claims. *Wright v. West*, 112 S.Ct. at 2497 (O'Connor, J., concurring). *Accord id.* at 2498 (Kennedy, J., concurring)(explaining that *Teague* is not on a "collision course" with independent federal adjudication in habeas); *id.* at 2501 (Souter, J., concurring)(explaining that *Teague*
(continued...)

On occasion, the Court has divided over whether a proposed rule regarding federal habeas is properly understood as a procedural requirement that streamlines the process by which claims are presented, or as a threat to the substantive core of the federal courts' jurisdiction.⁴² Yet, when it has been agreed that a rule urged by the state would undercut the very subject matter jurisdic-

⁴¹ (...continued)

only determines which federal legal standard a federal court must apply independently). For an elaboration of these points, see Brief *Amicus Curiae* on Behalf of Nicholas deB. Katzenbach, Edward H. Levi, et al., in *Gilmore v. Taylor*, 113 S.Ct. 2112.

Screening habeas corpus petitions for "new rules" only ensures that when a federal district court exercises jurisdiction on the merits, it confines itself to claims that, if resolved against the state, "can invalidate a final judgment." *Keeney v. Tamayo-Reyes*, 504 U.S. ___, ___, 112 S.Ct. 1715, 1728 (1992) (Kennedy, J., dissenting). Accord *id.* at 1722 (O'Connor, J., dissenting) (characterizing *Coleman*, *McCleskey*, and *Teague* as threshold "hurdles" that a petitioner must clear in order to put a federal claim "properly" before the district court for a determination of the merits).

⁴² That happened in *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715. Justice O'Connor's dissent drew a sharp distinction between rules for determining whether a claim is properly before a federal court for decision on the merits (regarding which forfeitures may be legitimate) and rules for determining the manner in which a federal court actually determines the merits (regarding which forfeitures are impermissible). She put the rule at stake in *Tamayo-Reyes* (touching the development of the material facts underlying a federal claim) in the second category. The Court did not reject Justice O'Connor's distinction between the two kinds of rules. Justice White's majority opinion did not quarrel with Justice O'Connor's understanding that *Coleman*, *McCleskey*, and *Teague* are "precondition[s] to reaching the merits . . ." 112 S.Ct. at 1719 n.3. The majority disagreed with Justice O'Connor only in that, in the majority's view, rules governing procedural default with respect to the development of primary facts fall in the same category as procedural-bar rules -- and not (where Justice O'Connor would put them) in the (forbidden) category of rules that undermine the federal courts' jurisdiction to determine properly presented claims independently.

tion the federal courts exercise in habeas corpus, the Court has consistently turned the proposed rule away. E.g., *Withrow v. Williams*, 113 S.Ct. 1745. To sustain the federal courts' ability to redress violations of federal law in habeas corpus is only to respect the decision that Congress has made to make the federal courts available for this vital work.⁴³

There can be no question that the rule the circuit court announced below would seriously undermine the federal habeas courts' ability to perform their core function. To exercise its habeas jurisdiction, a district court simply must have authority to keep a prisoner alive long enough to consider whatever properly preserved and presented claims the prisoner may have. Concomitantly, a district court must have authority to give an indigent prisoner a lawyer so that the prisoner's initial federal petition can satisfy pertinent procedural requirements.

Frank McFarland does not object to any of the procedural prerequisites this Court has found to be warranted for the protection of state interests. He seeks no dispensation from the exhaustion doctrine in *Rose v. Lundy*, the procedural default rules in *Coleman v. Thompson*, or the successive petition rules in *McCleskey v. Zant*. On the contrary, McFarland seeks only a fair opportunity to comply with those procedural rules and for the means by which to do so. Specifically, he asks for a competent lawyer and a little time in which to

⁴³ For a discussion of the statutory basis of the federal habeas jurisdiction and the impropriety of undermining it by judicial decision, see Brief *Amicus Curiae* on Behalf of Gerald Gunther, Philip B. Kurland, Daniel J. Meltzer, Paul J. Mishkin, Martin H. Redish, Frank J. Remington, David L. Shapiro, and Herbert Wechsler, in *Wright v. West*, 112 S.Ct. 2482. See *Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. ___, ___, 112 S.Ct. 560, 564 (1991) (opinion for the Court by Kennedy, J.) (explaining that *stare decisis* has "special force" in cases turning on the interpretation of statutes).

work with that lawyer in the preparation of his petition. In short, he asks only for what Congress has expressly provided that he should receive.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the circuit court and remand with instructions that the district court stay petitioner's execution for the time that court needs to secure appointed counsel and, in addition, for the time appointed counsel needs to investigate this case, to develop all potentially meritorious federal claims and supporting facts, and to prepare and file an effective habeas corpus petition on petitioner's behalf.

Respectfully submitted,

Larry W. Yackle
(*Counsel of Record*)
Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Diann Y. Rust-Tierney
Capital Punishment Project
American Civil Liberties Union
Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-1681

Dated: January 13, 1994

14

93 6497

No. 93-1334
6497

Supreme Court, U.S.
FILED
JAN 13 1994
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,
Petitioner,
v.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice Institution Division,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

R. WILLIAM IDE III *
President
AMERICAN BAR ASSOCIATION
750 N. Lake Shore Drive
Chicago, IL 60611
(312) 988-5000

STEPHEN H. SACHS
MICHAEL A. MILLEMAN
MICHAEL A. MELLO
JOHN E. SMITH
DAVID M. SHUB

* Counsel of Record

Counsel for Amicus Curiae

39 pp

QUESTION PRESENTED

DOES A FEDERAL DISTRICT COURT POSSESS JURISDICTION TO GRANT A STAY OF EXECUTION UNDER EITHER 28 U.S.C. § 2251 OR 28 U.S.C. § 1651(A), IN ORDER TO APPOINT COUNSEL FOR AN INDIGENT *PRO SE* DEATH ROW INMATE WHO HAS NOT YET FILED A HABEAS CORPUS PETITION BUT WHO HAS EXPRESSED AN INTENTION TO FILE A PETITION ONCE COUNSEL IS OBTAINED?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	vi
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	8
I. WITHOUT REASONABLE STAYS OF EXECUTION AND EARLY APPOINTMENTS OF FEDERAL HABEAS CORPUS COUNSEL, TEXAS DEATH-SENTENCED PRISONERS WHOSE CONVICTIONS AND SENTENCES HAVE BEEN UNCONSTITUTIONALLY IMPOSED WILL BE EXECUTED	8
A. The Texas Postconviction Process Does Not Reliably Identify Or Redress Constitutional Violations In The Cases Of Unrepresented Death-Sentenced Prisoners, Especially Because The State Seeks To Execute Them, Often Through Accelerated Procedures, Soon After The Conclusion Of Direct Review	8
B. Reasonable Stays Of Execution And Early Appointments Of Federal Habeas Corpus Counsel Are Essential To Allow Death-Sentenced Prisoners To Identify And To Seek Redress For Constitutional Violations..	11
II. THERE NOW IS A NATIONAL CONSENSUS THAT COUNSEL SHOULD BE PROVIDED TO FIRST-TIME CAPITAL POSTCONVICTION PETITIONERS THROUGHOUT THE STATE AND FEDERAL POSTCONVICTION PROCESS	14
A. The Report of the Powell Committee	14
B. Actions Taken by the United States Judicial Conference and State Conference of Chief Justices	14

TABLE OF CONTENTS—Continued

	Page
C. ABA Habeas Report	15
D. State Laws and Practices	16
III. THERE IS A NATIONAL CONSENSUS THAT FIRST-TIME CAPITAL POSTCONVICTION PETITIONERS SHOULD BE GIVEN A REASONABLE TIME TO INVESTIGATE, PREPARE AND PRESENT CLAIMS AND, CONVERSELY, SHOULD NOT BE REQUIRED TO INVESTIGATE, PREPARE AND LITIGATE THEIR CASES IN A FEW DAYS OR WEEKS UNDER IMPENDING EXECUTION DATES	17
A. The Report of the Powell Committee	17
B. ABA Habeas Report	18
C. State Laws and Practices	19
IV. THIS COURT'S HABEAS CORPUS JURISPRUDENCE DEMONSTRATES THE CRITICAL IMPORTANCE IN VINDICATING CONSTITUTIONAL RIGHTS OF HAVING BOTH COUNSEL THROUGHOUT THE STATE AND FEDERAL POSTCONVICTION PROCESS AND A REASONABLE TIME TO INVESTIGATE, PREPARE AND PRESENT CLAIMS..	21
V. AFFIRMANCE OF THE FIFTH CIRCUIT'S DECISION IN THIS CASE WILL UNDERMINE THE ADMINISTRATION OF JUSTICE WITHOUT ADVANCING ANY LEGITIMATE COUNTERVAILING STATE INTEREST.....	26
VI. THE TWO-PART NATIONAL CONSENSUS, THIS COURT'S HABEAS CORPUS JURISPRUDENCE, AND THE UNFAIR AND CHAOTIC CONSEQUENCES OF AFFIRMANCE, ALL SUPPORT PETITIONER'S CONSTRUCTION OF THE FEDERAL STATUTES AT ISSUE IN THIS CASE	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
<i>Amadeo v. State</i> , 384 S.E.2d 181 (Ga. 1989)	22
<i>Amadeo v. Zant</i> , 486 U.S. 214 (1988)	21, 22
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	27
<i>Barefoot v. Estelle</i> , 697 F.2d 593 (5th Cir. 1983) ..	27
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980)	27
<i>Brown v. Vasquez</i> , 952 F.2d 1164 (9th Cir. 1991), cert. denied, 112 S. Ct. 1778 (1992)	7, 20
<i>Caldwell v. Collins</i> , No. 3:92CV1316-P (N.D. Tex. June 30, 1992)	5
<i>California v. American Stores Co.</i> , 495 U.S. 271 (1990)	29
<i>Clark v. Tansy</i> , 1993 U.S. App. LEXIS 33987 (10th Cir. Dec. 30, 1993)	13
<i>Cole v. Texas</i> , 499 U.S. 1301 (1991)	4
<i>Duff-Smith v. Collins</i> , 973 F.2d 1175 (5th Cir. 1992), cert. denied, 113 S. Ct. 1958 (1993)	13
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	27
<i>Ford v. State</i> , 407 So. 2d 907 (Fla. 1981)	23
<i>Ford v. Strickland</i> , 676 F.2d 434 (11th Cir. 1982) ..	23
<i>Ford v. Wainwright</i> , 451 So. 2d 471 (Fla. 1984)	23
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986)	21, 22
<i>Ford v. Wainwright</i> , 752 F.2d 526 (11th Cir. 1985)	23
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977)	27
<i>Gosch v. Collins</i> , SA-93-CA-731 (W.D. Tex. Sept. 15, 1993), aff'd, 1993 U.S. App. Lexis 29086 (5th Cir. Sept. 16, 1993)	4-6, 12
<i>Gosch v. Collins</i> , SA-93-CA-736 (W.D. Tex. Oct. 12, 1993), appeal pending, No. 93-8780 (5th Cir.)	6
<i>Hernandez v. Collins</i> , No. CA-L-92-111 (S.D. Tex. Aug. 20, 1992)	5
<i>Hitchcock v. Dugger</i> , 481 U.S. 393 (1987)	25
<i>Hitchcock v. Wainwright</i> , 745 F.2d 1332 (11th Cir. 1984), aff'd en banc, 770 F.2d 1514 (1985)	25
<i>In re Clark</i> , 855 P.2d 729 (Cal. 1993)	19
<i>In re Lindsey</i> , 875 F.2d 1502 (11th Cir. 1989)	13
<i>Johnson v. Mississippi</i> , 486 U.S. 578 (1988)	21, 24

TABLE OF AUTHORITIES—Continued

	Page
<i>Johnson v. State</i> , 511 So. 2d 1333 (Miss. 1987)	23
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	27
<i>Long v. Collins</i> , No. 3-92CV1889-T (N.D. Tex. Sept. 15, 1992)	5
<i>Maynard v. Cartwright</i> , 486 U.S. 356 (1988)	25
<i>McCleskey v. Zant</i> , 499 U.S. 467 (1991)	13, 25, 26
<i>Murray v. Giarratano</i> , 492 U.S. 1 (1989)	21, 30
<i>Parker v. Dugger</i> , 498 U.S. 308 (1991)	25
<i>Parker v. Dugger</i> , 876 F.2d 1470 (11th Cir. 1989) ..	25
<i>Parker v. State</i> , 458 So. 2d 750 (Fla. 1984)	25
<i>Parker v. State</i> , 491 So. 2d 532 (Fla. 1986)	25
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	24
<i>People v. Johnson</i> , 506 N.E.2d 1177 (N.Y. 1987) ..	24
<i>Sterling v. Collins</i> , No. 3-93CV0147-G (N.D. Tex. Jan. 22, 1993)	5
<i>Tiffany Fine Arts, Inc. v. United States</i> , 469 U.S. 310 (1985)	28
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	27
<i>Yates v. Aiken</i> , 474 U.S. 896 (1985)	24
<i>Yates v. Aiken</i> , 484 U.S. 211 (1988)	24
<i>Yates v. Evatt</i> , 111 S. Ct. 1884 (1991)	24
<i>Statutes and Statutory Guidelines</i>	
21 U.S.C. § 848 (1988)	7, 28, 29
28 U.S.C. § 1651 (1988)	7, 28
28 U.S.C. § 2251 (1988)	28
Cal. Penal Code § 1243 (West 1982)	19
Guidelines for the Administration of the Criminal Justice Act, 18 U.S.C. § 3006A	14, 15
<i>Miscellaneous</i>	
134 Cong. Rec. 22,996 (1988)	29
ABA Crim. Just. Section, Report to the House of Delegates (1989), reprinted in 40 Am. U.L. Rev. 1, 9 (1990)	2, 11, 12, 15, 16, 18, 19
ABA Res. 102B (approved by ABA House of Delegates at 1979 Midyear Meeting)	2
ABA Res. 112D (approved by ABA House of Delegates at 1982 Annual Meeting)	2

TABLE OF AUTHORITIES—Continued

	Page
ABA Study: An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases (Dec. 1993) (study conducted by the Spangenberg Group, provided to the Clerk, United States Supreme Court)	3, 4, 11, 12, 16, 17, 19
Ballard, Mark, <i>Study Rips Texas' Capital Representation</i> , Texas Lawyer, Apr. 26, 1993	2
C.D. Cal. R. 26	20
Conference of Chief Judges, Res. IX, Representation of Death Row Inmates In Postconviction Proceedings (adopted at the 10th Midyear Meeting on Feb. 5, 1987)	15
E.D. Cal. R. 191	20
Fla. Sup. Ct. R. Crim. P. 3.850 (1993)	20
Fla. Sup. Ct. R. Crim. P. 3.851	20
Joint Appendix, <i>Ford v. Wainwright</i> , 477 U.S. 309 (1986) (No. 85-5542)	23
Joint Appendix, <i>Johnson v. Mississippi</i> , 486 U.S. 578 (1988) (No. 87-5468)	24
Judicial Conf. of the U.S. Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989)	14, 17, 18, 28
Mello, Michael, <i>Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row</i> , 37 Am. U.L. Rev. 513 (1988)	21
N.D. Cal. R. 296	20
NAACP Leg. Def. and Educ. Fund, Inc., Death Row, U.S.A., Fall 1993	2, 21
Petitioner's Brief in Support of Application for Certificate of Probable Cause and Motion for Stay of Execution, <i>McFarland v. Collins</i> , 7 F.3d 47 (5th Cir. 1993)	4
Response to Petition for Writ of Habeas Corpus, <i>Ford v. Wainwright</i> , No. 84-6493-Civ-NCR (S.D. Fla. May 29, 1984)	23
S.D. Cal. R. 9.3	20
Spangenberg Group, A Study of Representation of Capital Cases in Texas (Mar. 1993) (study provided to the Clerk, United States Supreme Court)	1-4, 8, 10, 11

TABLE OF AUTHORITIES—Continued

	Page
Spangenberg Group, Time and Expense Analysis in Post-Conviction Death Penalty Cases (1987) (study provided to the Clerk, United States Supreme Court)	9
Texas Resource Ctr. Bd. of Dir., Crisis in Representation of Texas Death Row Inmates (Oct. 26, 1993) (paper provided to the Clerk, United States Supreme Court)	10
Texas State Bar Ad Hoc Comm. Regarding Legal Representation of Those on Death Row, Texas Plan (1987) (committee report provided to the Clerk, United States Supreme Court)	9
Wilson, Richard J. & Spangenberg, Robert L., <i>State post-conviction representation of defendants sentenced to death</i> , 72 Judicature 331 (Apr.-May 1989)	8, 16

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

STATEMENT OF INTEREST

The American Bar Association ("ABA") submits this brief to provide the Court with comparative information about the capital counsel crisis in Texas and the quite different two-part national consensus that (1) counsel should be provided to condemned prisoners throughout first-time state and federal postconviction litigation, and (2) counsel should be given reasonable time to investigate, prepare and litigate first-time postconviction claims.¹ This information helps give meaning to the federal statutes that control this case. The ABA has obtained the consent of both parties to file this brief.

The ABA takes no position on the constitutionality of the death penalty. It has worked hard to try to ensure that the death penalty is administered fairly. In 1986, the ABA created a Death Penalty Postconviction Representation Project, which recruits volunteer lawyers to represent death row inmates and seeks to create programs that provide qualified, compensated counsel to capital postconviction petitioners.

The ABA also has commissioned several studies of the experiences of counsel in capital postconviction cases and judicial review of death cases. The ABA experience and studies establish that, after execution dates have been set, it is increasingly difficult nationally, and often impossible now in Texas, to recruit volunteer attorneys to represent indigent death-sentenced prisoners in first-time capital postconviction cases.² This is one of the multiple causes

¹ In this brief, the ABA intends the term "postconviction" to include both state collateral challenges to capital convictions and sentences, called "habeas corpus" in Texas, and federal habeas corpus.

² Spangenberg Group, *A Study of Representation of Capital Cases in Texas* i, viii, 161-63 (Mar. 1993) (study provided to the Clerk, United States Supreme Court) [hereinafter 1993 Texas Capital

of the Texas crisis³ that produced this case.⁴

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Administration Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Administration Division Council prior to filing.

SUMMARY OF ARGUMENT

Texas' death row population is the second largest in the United States. In October 1993 there were 365 Texas death-sentenced prisoners.⁵ They had been convicted and

Representation Study]. This study was requested by the State Bar of Texas and funded by the Texas Bar Foundation. *Id.* A summary of the study's findings is contained in Mark Ballard, *Study Rips Texas' Capital Representation*, Texas Lawyer, Apr. 26, 1993, at 3.

³ 1993 Texas Capital Representation Study, *supra* note 2, at i.

⁴ The ABA currently is attempting to help create a governmentally-funded capital postconviction program in each death penalty state. This is a logical outgrowth of prior ABA actions. In 1979, the ABA proposed "that the United States Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate post-conviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel" ABA Res. 102B (adopted by ABA House of Delegates at 1979 Midyear Meeting) (emphasis added). In 1982, the ABA resolved to "support the prompt availability of competent counsel for both state and federal [postconviction] court proceedings." ABA Res. 112D (approved by ABA House of Delegates at 1982 Annual Meeting) (emphasis added).

The ABA also has been a leading proponent of legislative reform designed to secure competent attorneys for capital defendants and petitioners. See ABA Crim. Just. Section, Report to the House of Delegates (1989), reprinted in 40 Am.U.L. Rev. 1, 9 (1990) [hereinafter ABA Habeas Report]. This major report is analyzed in this brief, as are other ABA reports and studies.

⁵ California's is the largest; it had 375 death-sentenced prisoners in October 1993. NAACP Leg. Def. and Educ. Fund, Inc., Death Row, U.S.A., Fall 1993, at 13, 36.

sentenced in 73 of Texas' 254 counties.⁶ Although the sheer numbers of death-sentenced prisoners, as well as the geographical dispersion of counties in which they were convicted, have contributed to the crisis that produced this case, there are several more important causes of that crisis. First, Texas fails to provide counsel to death-sentenced prisoners who wish to file state habeas corpus petitions.⁷ Its "capital representation" problem "is substantially worse than that faced by any other state with the death penalty."⁸ It is the only death penalty state in which death-sentenced prisoners are not routinely represented in state postconviction proceedings.⁹

Second, excluding California (for which data were not available), in 1993 Texas judges set approximately *three quarters of the nation's execution dates* for death-sentenced prisoners who had not completed first-time state and federal postconviction proceedings ("first-time postconviction review").¹⁰ ABA Study: An Updated Analysis of the

⁶ 1993 Texas Capital Representation Study, *supra* note 2, at iii, 5.

⁷ "Presently no funds are allocated for payment of counsel or litigation expenses at the state habeas level." *Id.* at ii. Although Texas law authorizes district court judges to appoint and compensate counsel in state habeas corpus proceedings, "this is almost never done." *Id.* at vii.

⁸ *Id.* at i.

⁹ ABA Study: An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases, at Executive Summary (study conducted by the Spangenberg Group, provided to the Clerk, United States Supreme Court) [hereinafter 1993 ABA Counsel Study]. Until relatively recently, even with the extraordinary problems associated with recruiting volunteer lawyers, 1993 Texas Capital Representation Study, *supra* note 2, lawyers generally were available to represent habeas petitioners in State court. *Id.* at 97. Now, a number of prisoners cannot obtain counsel, at least when they are scheduled for execution. See *infra* Argument I.A. and notes 12-13.

¹⁰ There were 85 such execution dates, 63 of which were set by Texas district courts. 1993 ABA Counsel Study, *supra* note 9, at Executive Summary. In California, during first-time postconviction review, execution dates are stayed when court-appointed counsel file pleadings within prescribed timelines. *Id.*; see *infra* note 28.

Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases, at Executive Summary (Dec. 1993) (study conducted by the Spangenberg Group, provided to the Clerk, United States Supreme Court) ("1993 ABA Counsel Study"). Judges often set these execution dates soon after the conclusion of direct appeal¹¹ and refuse to stay executions for a reasonable period to allow first-time postconviction petitioners to obtain volunteer counsel and pursue post-conviction litigation. Fewer and fewer attorneys are volunteering under these circumstances.¹² Approximately 70 death-sentenced prisoners whose convictions and sentences have been affirmed on direct appeal do not now have lawyers.¹³

Third, shortly before the Fifth Circuit's decision in this case, it affirmed the District Court decision in *Gosch v. Collins*, SA-93-CA-731 (W.D.Tex. Sept. 15, 1993), *aff'd*, 1993 U.S. App. Lexis 29086 (5th Cir. Sept. 16, 1993). Before *Gosch*, federal district courts in Texas generally responded to the first-time habeas petitions of death-sentenced, *pro se* prisoners by staying their executions for a reasonable period of time so they could obtain counsel,

¹¹ "Once the [Texas] Court of Criminal Appeals affirms a sentence of death, the state district court often sets an early execution date." 1993 Texas Capital Representation Study, *supra* note 2, at 5. Indeed, Texas district courts sometimes set execution dates *before* the disposition of certiorari petitions by this Court until this Court indicated it would automatically stay them. See *Cole v. Texas*, 499 U.S. 1301 (1991) (Scalia, J., sitting as Circuit Justice) ("I will in this case, and in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari.").

¹² "It is far more difficult to get a lawyer to step into a case under an active execution warrant than it is when there is substantial time to prepare for the case." 1993 Texas Capital Representation Study, *supra* note 2, at vii-viii. "Texas is running out of volunteer lawyers and law firms willing to provide pro bono . . . representation in capital cases at State habeas." *Id.* at viii.

¹³ Petitioner's Brief in Support of Application for Certificate of Probable Cause and Motion for Stay of Execution at 9, *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993).

or by staying their executions and appointing them counsel. See, e.g., *Caldwell v. Collins*, No. 3:92CV1316-P, at 1 (N.D. Tex. June 30, 1992) (appointing counsel and staying execution because petitioner "has not had legal counsel to help him prepare and file an adequate initial Petition for Writ of Habeas Corpus . . ."); *Hernandez v. Collins*, No. CA-L-92-111, at 1 (S.D. Tex. Aug. 20, 1992) (staying execution and noting "the ever-growing crisis concerning the obtaining of quality legal representation for indigent defendants sentenced to death"); *Long v. Collins*, No. 3-92CV1889-T (N.D. Tex. Sept. 15, 1992) (appointing counsel, staying execution and giving counsel 100 days to prepare and file an amended habeas petition); *Sterling v. Collins*, No. 3-93CV0147-G, at 1 (N.D. Tex. Jan. 22, 1993) (staying execution and giving petitioner, with the help of the Texas Resource Center, 120 days to recruit volunteer counsel to "prepare and file a proper amended habeas corpus petition").

In *Gosch*, the District Court consolidated the *pro se* habeas petitioner's stay request and appointment of counsel request with the single issue raised in this petition, and, with execution imminent, decided all three. The Court, apparently simultaneously, denied the stay request, denied relief on the merits and appointed a lawyer from the Texas Resource Center to represent *Gosch*. *Gosch v. Collins*, *supra*. The Fifth Circuit affirmed. *Id.*¹⁴

These State practices and federal decisions now predetermine for *pro se* petitioners the outcome of a Kafkaesque process that undermines—indeed threatens to gut—federal habeas corpus and the right to counsel provisions of the Anti-Drug Abuse Act. The process and outcome are these:

1. Based on the decision of the Fifth Circuit, federal courts in Texas will require that a death-sentenced prisoner file a first-time federal habeas corpus petition before it appoints counsel or considers staying the execution.

¹⁴ For a more complete history of *Gosch*, see *infra* note 17.

2. The prisoner will not be capable, *pro se*, of filing even a minimally adequate federal habeas petition,¹⁵ especially because no lawyer has investigated or litigated potential state habeas claims, and therefore some of the most important potential federal habeas claims, which often arise out of state habeas litigation,¹⁶ have not been identified or exhausted.

3. If the prisoner, *pro se*, files a habeas petition, the district court may decide it on the merits as, or shortly after, it appoints counsel, and appointed counsel likely will be legally or practically foreclosed from asserting meritorious claims that counsel discovers after appointment.¹⁷

4. If the condemned prisoner, *pro se*, files a pleading like McFarland's,¹⁸ but does not file a formal habeas petition, he will be put to death, even though he may have meritorious federal constitutional claims, (a) before he can

¹⁵ See *infra* Argument IV.

¹⁶ See *infra* Argument IV.

¹⁷ See *Gosch v. Collins*, SA-93-CA-731 (W.D. Tex. Sept. 15, 1993), *aff'd*, 1993 U.S. App. LEXIS 29086 (5th Cir. Sept. 16, 1993). If, as in *Gosch*, counsel is appointed as the court denies a *pro se* petition on the merits, there is very little counsel can do. Indeed, in *Gosch*, after the district court denied relief, counsel filed a second habeas petition (the first one for which Gosch had counsel), in which Gosch asserted five new grounds for relief. The District Court initially stayed the execution, but then denied the petition and vacated the stay. The court held alternatively that it lacked jurisdiction and that the second petition abused the writ. *Gosch v. Collins*, SA-93-CA-736 (W.D. Tex. Oct. 12, 1993), *appeal pending*, No. 93-8780 (5th Cir.). The court said "[t]he same 'abuse of the writ' standard applies regardless of whether the petitioner is proceeding *pro se* or with the assistance of counsel." *Id.* at 12 (Memorandum Opinion and Order). Even if appointed counsel has a few days or weeks to investigate and prepare habeas corpus claims, that will not be enough time to represent a petitioner effectively. See *infra* Argument IV.

¹⁸ He filed a *Pro Se* Motion For Stay of Execution and Request for Appointment of Counsel, in which he stated his intent to file a habeas corpus petition. See Petitioner's Brief.

obtain the lawyer intended by Congress to investigate and, where meritorious, assert those claims, and (b) before he can invoke federal habeas corpus, the historic collateral remedy Congress provided to vindicate those claims.

This "perverse"¹⁹ process effectively nullifies the Great Writ and violates the central purpose of Congress in enacting the counsel provisions of the Anti-Drug Abuse Act, 21 U.S.C. § 848(q)(4)-(10) (1988), which was to make federal habeas corpus more available to condemned prisoners. To advance the purposes underlying these statutes, as well as 28 U.S.C. § 1651(a), and informed by the two-part national consensus, see *infra* Arguments II and III, this Court's habeas corpus jurisprudence, see *infra* Argument IV, and the chaotic and unfair consequences of affirmance, see *infra* Argument V, the Court should construe these federal statutes to require federal district courts to grant a stay of execution and to appoint counsel to an indigent *pro se*, death-sentenced prisoner who files a pleading like the one McFarland filed. (In this brief, we call such an appointment "early appointment of counsel").

¹⁹ *Brown v. Vasquez*, 952 F.2d 1164, 1169 (9th Cir. 1991) (identifying the "perverse absurdity" of executing habeas petitioners "before appointed counsel could be found or before that counsel could undertake the task for which he was appointed"), *cert. denied*, 112 S. Ct. 1778 (1992).

ARGUMENT

I. WITHOUT REASONABLE STAYS OF EXECUTION AND EARLY APPOINTMENTS OF FEDERAL HABEAS CORPUS COUNSEL, TEXAS DEATH-SENTENCED PRISONERS WHOSE CONVICTIONS AND SENTENCES HAVE BEEN UNCONSTITUTIONALLY IMPOSED WILL BE EXECUTED

A. The Texas Postconviction Process Does Not Reliably Identify Or Redress Constitutional Violations In The Cases Of Unrepresented Death-Sentenced Prisoners, Especially Because The State Seeks To Execute Them, Often Through Accelerated Procedures, Soon After The Conclusion Of Direct Review

In Texas, the extraordinary numbers of post-appeal execution orders, accelerated postconviction litigation schedules and decreasing numbers of volunteer attorneys effectively nullify the State postconviction process for many death-sentenced prisoners. The Texas capital representation crisis is the core problem.

Almost all the lawyers in Texas capital postconviction proceedings are volunteers.²⁰ This is a difficult undertaking. Substantive and procedural death penalty law is extraordinarily complex;²¹ the practice is stressful;²² and it is time-consuming and therefore expensive.²³

²⁰ 1993 Texas Capital Representation Study, *supra* note 2, at i-ii.

²¹ See *infra* Argument IV.

²² There is an extraordinary "emotional cost associated with the representation of a person whose sole lifeline may be the volunteer attorney." Richard J. Wilson & Robert L. Spangenberg, *State post-conviction representation of defendants sentenced to death*, 72 *Judicature* 331, 337 (Apr.-May 1989).

²³ In 1986, the American Bar Association conducted a national survey of the time spent and expenses incurred by attorneys in capital postconviction cases. The median hours of attorneys who represented capital petitioners in state and federal postconviction cases were: 400 at the state trial court level; 200 on state appeal; 65 on state certiorari to this Court; 305 at the federal district court level; 320 on federal appeal; and 180 on federal certiorari

These problems are magnified when execution dates have been set. To stay the execution, counsel must master a substantial record and a complex area of law while simultaneously litigating both the merits and the stay request in federal and state forums, often before more than one court in each. This sometimes involves a literal race from court to court to meet deadlines.

The Texas capital representation crisis has been building for several years. In 1987, a Texas committee chaired by the Honorable M.P. Duncan III of the Texas Court of Criminal Appeals concluded that "the absence of a system to insure that death-sentenced inmates have counsel throughout the appeals process has had a detrimental effect upon all the parties and upon the quality of justice in both our state and federal courts." Texas State Bar Ad Hoc Comm. Regarding Legal Representation of Those on Death Row, Texas Plan 1 (1987) (committee report, provided to the Clerk, United States Supreme Court). The absence of a counsel system affected the state ("cases have not progressed smoothly or at a reasonable pace through the court system"), the defendant ("he or she has not had the means to test the fairness of his or her conviction and sentence of death"), the courts ("it has meant high-pressure decision making because an execution is imminent and sometimes briefs and arguments have been inadequate"), and "society at large" ("the larger issues present in many of the death cases receive inferior adversarial testing"). *Id.* at 1-2.

to this Court. See Spangenberg Group, Time and Expense Analysis in Post-Conviction Death Penalty Cases 9 (1987) (Table 5) (study provided to the Clerk, United States Supreme Court). The 1993 Texas Capital Representation Study found that the median number of attorney hours spent on habeas capital cases in Texas courts was 350. The time was "understated" because some of the cases still were "active." 1993 Texas Capital Representation Study, *supra* note 2, at 90. Thus, a lawyer who volunteers to represent a Texas death-sentenced prisoner likely will commit at least several hundred uncompensated hours to state postconviction litigation.

The representation problem became significantly worse in 1991 when "the Court of Criminal Appeals suddenly stopped granting stays to allow additional time for the [Texas Resource] Center to recruit volunteer counsel"; and, at the same time, "state trial courts began setting execution dates in unprecedented numbers": 64 in 1991; 111 in 1992; and 89 in 1993 (as of October 26, 1993).²⁴ Now, "[m]ore than 75 death row prisoners do not have attorneys." As a result, "[n]o attorney has examined these individuals' cases for potential postconviction appeals." Texas Resource Ctr. Bd. of Dir., Crisis in Representation of Texas Death Row Inmates 6 (Oct. 26, 1993) (paper provided to the Clerk, United States Supreme Court).

A 1993 study confirmed these conclusions, stating, "in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty. Spangenberg Group, A Study of Representation of Capital Cases in Texas, at i (Mar. 1993) (study provided to the Clerk, United States Supreme Court) ("1993 Texas Capital Representation Study"). The Texas problem is "desperate" because the number of cases is "overwhelming," "no funds are allocated for payment of counsel or litigation expenses" and "the number of available attorneys and firms remains limited." *Id.* at ii. The study links Texas' execution scheduling policy to declining numbers of volunteer lawyers, noting that "the large number of cases with approaching dates of execution makes the problem most acute at this time." *Id.* The problem will get worse. "We estimate that the number of persons on death row will continue to grow at an even higher rate in the next few years." *Id.* at 4.

²⁴ Texas Resource Ctr. Bd. of Dir., Crisis in Representation of Texas Death Row Inmates 5 (Oct. 26, 1993) (paper provided to the Clerk, United States Supreme Court) (footnote omitted). In 1992, there also was a marked increase in the "rate of affirmances of death sentences by the Court of Criminal Appeals." *Id.*

Although there now is a resource center in Texas, for many reasons it is incapable of representing all, or even most, of Texas' death-sentenced prisoners. No state provides less financial support for state postconviction counsel in capital cases than does Texas.²⁵ No state, through its death warrant policy, provides more work for resource center attorneys. By generating approximately 75% of the nation's first-time postconviction death warrants (outside of California), 1993 ABA Counsel Study, *supra*, at Executive Summary, Texas both forces the Resource Center attorneys to dedicate enormous amounts of time to "satellite litigation" that "occurs at every court level," ABA Crim. Just. Section, Report to the House of Delegates (1989), *reprinted in* 40 Am. U.L. Rev. 1, 9, 138 (1990) ("ABA Habeas Report") (footnotes omitted), and makes it more difficult for the Center to recruit volunteer lawyers to help. "Few good attorneys are willing to litigate in such harried and compressed circumstances." *Id.* at 40 n.85; *see supra* note 12.

In sum, "despite enormous effort in a wide variety of areas, the Resource Center is simply not equipped to handle the kind of work required of it by current practices regarding the appointment of counsel in capital cases." 1993 Texas Capital Representation Study, *supra*, at 9.

B. Reasonable Stays Of Execution And Early Appointments Of Federal Habeas Corpus Counsel Are Essential To Allow Death-Sentenced Prisoners To Identify And To Seek Redress For Constitutional Violations

As this case demonstrates, the Texas capital representation problem is not just a state problem; it is a serious federal problem as well. In all other death penalty states, lawyers are representing first-time state postconviction pe-

²⁵ *See* 1993 Texas Capital Representation Study, *supra* note 2, at 127 (Table 9-4). Even in those states in which there is no "clear responsibility to provide counsel and compensation," funds still are provided "in the vast majority of cases." *Id.* The State of Texas provides no financial support to the Resource Center. *Id.* at 6-9.

tioners, *see* 1993 ABA Counsel Study, *supra*, at Executive Summary, and, therefore, can identify the direct appeal and postconviction issues that should be included in a federal habeas corpus petition. Often, that lawyer investigates and drafts a first-time federal habeas petition, which results in the federal appointment of counsel. In these other states, the postconviction lawyers, as well as other lawyers, have reasonable time to investigate, prepare and assert habeas claims. *Id.*

Increasingly in Texas, death-sentenced prisoners can not obtain a state habeas lawyer who, upon completion of the state proceeding, could draft the first-time federal habeas petition. The Fifth Circuit's decision in *Gosch v. Collins*, *supra*, likely will make it harder to recruit volunteer federal habeas lawyers. Potential volunteer attorneys now know they may have little time to investigate, prepare and litigate first-time federal habeas claims.²⁶

The only way to effectively enforce the federal habeas corpus and federal right to counsel provisions for death-sentenced prisoners like McFarland is to stay executions. Such stays should not cause unwarranted delay. After staying an execution the district court could either require petitioner to obtain volunteer counsel promptly or *immediately* appoint counsel and issue a reasonable sched-

²⁶ The absence of counsel in the state habeas corpus proceeding, or the absence of the state proceeding itself, will have extraordinary impact on federal habeas jurisprudence and the habeas role of the federal courts. In its Habeas Report, *supra* note 4, at 72 (citations omitted), the ABA said:

The more fully and effectively litigated the prior stages in the process have been, the more efficient postconviction review (including federal habeas corpus review) will be. By helping to build a clear and complete state court record, for example, competent counsel in the state courts can go a long way toward assuring that the federal courts can move quickly and directly to the substantive merits of the claims raised in the habeas corpus petition.

Construing the federal statutes as Petitioner proposes would avoid troubling Federalism-based problems.

uling order. After reviewing the record and conducting an expeditious investigation, as warranted, counsel could assert colorable and exhausted constitutional claims in a federal habeas petition. Or counsel might identify colorable claims that have not been exhausted, seek to dismiss without prejudice the federal proceeding, *see Clark v. Tansy*, 1993 U.S. App. LEXIS 33987 (10th Cir. Dec. 30, 1993) (district court decision to deny habeas petitioner's motion to dismiss without prejudice subject to "abuse of discretion" standard of review), and assert those claims in a state habeas petition, in which case counsel thereafter would be acting as a volunteer. *See In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989).²⁷ The district court, which has ample powers to manage and schedule litigation, would have broad discretion to prevent abuse of such a process. *See, e.g., Duff-Smith v. Collins*, 973 F.2d 1175, 1179 (5th Cir. 1992) (district court did not abuse its discretion by denying replacement habeas counsel's request to amend petition and conduct a "McCleskey investigation"), *cert. denied*, 113 S. Ct. 1958 (1993).

²⁷ Although it might appear that exhausting state remedies would delay an execution, "[w]ith a complete record," which can be developed in State court, "most or all of the time-consuming factual, preliminary and procedural questions that now take up so much of the federal court's time in habeas cases will be eliminated." ABA Habeas Report, *supra* note 4, at 72 (citations omitted). If, *arguendo*, exhausting remedies in state court does take additional time, that delay could be obviated if Texas provided State postconviction petitioners with postconviction counsel and a more orderly postconviction process. It is clear that if the federal habeas petitioner does not exhaust state remedies, but chooses instead to assert only exhausted issues in federal court, he will not be able to return to state court, exhaust the unexhausted issues and assert them in a second federal habeas petition. *McCleskey v. Zant*, 499 U.S. 467 (1991). "After *McCleskey*, it is essential that a habeas petitioner exhaust every possible claim in state court prior to proceeding for the first time on habeas." *Clark v. Tansy*, 1993 U.S. App. LEXIS 33987, at *5 (10th Cir. Dec. 30, 1993).

II. THERE NOW IS A NATIONAL CONSENSUS THAT COUNSEL SHOULD BE PROVIDED TO FIRST-TIME CAPITAL POSTCONVICTION PETITIONERS THROUGHOUT THE STATE AND FEDERAL POST-CONVICTION PROCESS

A. The Report of the Powell Committee

In 1989, a distinguished committee chaired by former Justice Lewis F. Powell, Jr. criticized unnecessary delay in the review of capital cases, distinguishing "delay needed for review of constitutional claims." Judicial Conf. of the U.S. Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, Committee Report and Proposal 1 (Aug. 23, 1989) ("Powell Committee Report"). The Committee identified a "second serious problem": a "pressing need for qualified counsel to represent inmates in collateral review." *Id.* at 4. The Committee stressed that "provision of competent counsel for prisoners under capital sentence *throughout* both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants," and warned that "[t]he belated entry of a lawyer, under severe time pressure, does not do enough to ensure fairness." *Id.* (emphasis added).

B. Actions Taken by the United States Judicial Conference and State Conference of Chief Justices

Federal and state judges have worked to ensure that capital postconviction petitioners are adequately and continuously represented. In March 1987 the United States Judicial Conference amended Paragraph 2.14B (now Paragraph 6.01D(1)) of the Guidelines for the Administration of the Criminal Justice Act, 18 U.S.C. § 3006A, to authorize federal judges to appoint qualified "state post-conviction counsel" to represent capital habeas petitioners in federal court to assure "continuity of representation". The Judicial Conference also amended the Guidelines to authorize the reasonable employment and "compensation of public and private organizations," like resource centers, that "provide consulting services to appointed and *pro*

bono lawyers in capital federal habeas corpus cases." See Paragraph 6.03C.

In addition, resource centers now have been established in nineteen death penalty states. The Judicial Conference helped create these centers, several of which rely heavily on volunteer attorneys, to facilitate the early assignment of counsel in death penalty habeas corpus cases.

The Conference of Chief Justices, which includes the chief judicial officers of every state, has urged judicial leaders in each death penalty state to take action to assure that death row inmates receive competent legal representation in postconviction proceedings. In 1987, the Conference resolved that each state's judicial leadership should quickly begin a planning process "to establish a regular process of appointing, providing expert guidance for, and fairly compensating competent counsel to *prepare* and pursue state postconviction petitions for all state death row inmates wishing to pursue such remedies" Conference of Chief Judges, Res. IX, Representation of Death Row Inmates In Postconviction Proceedings (adopted at the 10th Midyear Meeting on Feb. 5, 1987) (emphasis added). The Chief Justices also proposed that the state and federal judiciaries seek "to assure continuity of representation of death row inmates in state and federal post conviction proceedings" *Id.*

C. ABA Habeas Report

In its Habeas Report, the ABA recommended that the state and federal governments should "provide competent and adequately compensated counsel" to "petitioners" throughout "all stages of capital punishment litigation." ABA Habeas Report, *supra*, at 9 (Recommendation No. 1). "Providing qualified counsel serves two major goals: it not only assures fairness, but also avoids unnecessary delay in the process." *Id.* at 15. The provision of "new counsel" to death-sentenced inmates "*before the Commencement of state post-conviction proceedings*" will, in the view of the ABA, "reduce protracted litigation and

later costly remands" by presenting "claims of ineffectiveness" in "the first petition." *Id.* at 24 (emphasis added). The ABA recommended that this new lawyer represent the death-sentenced prisoner throughout the remainder of state, federal and Supreme Court proceedings because "[c]ontinuity of counsel generally will minimize delay, and assure that counsel is familiar with and/or responsible for the record in the case." *Id.* at 24-25.

D. State Laws and Practices

In 1988, the results of a 1987 capital postconviction representation study were published. The study established that there were 30 states in which there had been capital postconviction litigation. In 14 states, "primary representation" was "provided either by a statewide public defender appellate unit or an independent state appellate program." In eight states, "primary representation" was "provided by local trial public defenders or contract programs." In seven states, including Texas, "volunteer counsel" were identified as one of the primary providers of representation." Richard J. Wilson & Robert L. Spangenberg, *State post-conviction representation of defendants sentenced to death*, 72 *Judicature* 331, 335 (Apr.-May 1989). Of the 30 states, 23 provided "pre-petition" postconviction counsel either "in all cases" (17), or in "most cases" or "frequently" (6). *Id.* In 1987, there was "a notable trend among the states to provide counsel pre-petition, due in large measure to the . . . intricacies of state capital post-conviction law." *Id.* The authors predicted that "the pool of volunteer lawyers cannot expand rapidly enough to meet the growing need." *Id.* at 337.

In 1993, at the request of the ABA, The Spangenberg Group updated the 1987 study. Much had changed. "[I]n all states but Texas, counsel are appointed or otherwise available to represent petitioners in all first-round capital postconviction cases." 1993 ABA Counsel Study, *supra*, at Executive Summary (emphasis added). The other death penalty states rely on trial and appellate public defenders, court-appointed attorneys, contract attorneys, re-

source centers and volunteers, usually in some combination, to represent capital postconviction petitioners. *Id.*

We do not mean to overstate the point. In death penalty states other than Texas, volunteer attorneys represent death-sentenced prisoners, and the number of available volunteers in these states may be dwindling too. In other states, particularly those with large death row populations, lawyers who represent capital postconviction petitioners are struggling to keep up with increasing numbers of death-sentenced clients. Some of the state counsel coverage plans have patchwork and temporary qualities. The basic point, however, remains: Texas is the only death penalty state that fails to provide state postconviction counsel to first-time petitioners, issues execution orders soon after the conclusion of direct appeal, fails to automatically or routinely stay those orders while the prisoners obtain counsel, and seeks to execute unrepresented condemned prisoners, often under accelerated procedures, before they have had any real opportunity to pursue first-time state and federal postconviction relief.

III. THERE IS A NATIONAL CONSENSUS THAT FIRST-TIME CAPITAL POSTCONVICTION PETITIONERS SHOULD BE GIVEN A REASONABLE TIME TO INVESTIGATE, PREPARE AND PRESENT CLAIMS AND, CONVERSELY, SHOULD NOT BE REQUIRED TO INVESTIGATE, PREPARE AND LITIGATE THEIR CASES IN A FEW DAYS OR WEEKS UNDER IMPENDING EXECUTION DATES

A. The Report of the Powell Committee

The Powell Committee concluded that "last-minute litigation" to stay executions "disserves inmates, and saps the resources of our judiciary." Powell Committee Report, *supra*, at 1. The Committee characterized the "[f]requent litigation over motions for stays of execution" as "another example of an unnecessary step in the process," *id.* at 2, and it criticized "appointment of qualified counsel only when an execution is imminent." By this time,

"serious constitutional claims may have been waived." *Id.* at 4. The Committee proposed "one complete and fair course of collateral review in the state and federal system," under set time frames and "free from the time pressure of impending execution." *Id.* at 6.

B. ABA Habeas Report

After an extensive study by a task force of state and federal judges, prosecutors and defense attorneys, the ABA concluded that "[t]here is general agreement that the current situation," in which execution dates are set shortly after the end of the direct appellate process, "is neither desirable nor effective." ABA Habeas Report, *supra*, at 138. The ABA pointed out that support for its "one full and fair time through" approach, which includes the mandatory stay rule, "came from all sectors of the criminal justice system." "Even vigorous opponents of death penalty habeas corpus in its present form conceded that a proposal of one fair and complete course of post-conviction review free from the time pressures of an impending execution would be agreeable if it would then lead to finality." *Id.* at 38-39 (footnotes omitted). The ABA summarized some of the testimony on this point:

Caprice Cospers, for example, an Assistant District Attorney in Houston, remarked that the setting of execution dates "is perhaps the single most substantial impediment to the orderly administration of capital habeas cases in Texas. . . . It makes a chaotic mess out of the system of administering these cases." Termed "cumbersome," "ludicrous," and "mind boggling," the setting of artificial execution dates and the "scorpions in a bottle mentality" that it engenders "undermines the system by undermining the quality of justice during eleventh-hour litigation."

Id. at 138 (footnotes omitted).

Stressing that "it is extremely difficult to recruit lawyers when an execution date has been set," *id.*, the ABA recommended that federal courts stay scheduled state executions "until the completion of the initial round of state and federal post-conviction review," because, *inter*

alia, the mandatory stay rule would "help attract competent counsel to join (and not dissuade counsel from joining) the pool of available capital appellate and post-conviction attorneys." *Id.* at 10-11, 38.

C. State Laws and Practices

Texas is the only death penalty state in the nation that "routinely" sets, and does not subsequently "routinely" or "automatically" stay, execution dates before or during first-time post-conviction litigation. 1993 ABA Counsel Study, *supra*, at Executive Summary. Although 12 of 36 death penalty states issued execution warrants in 1993 during the first round of state and federal postconviction, in six of these states "stays of execution are automatically granted by law during the first round if petitions are filed by counsel within a reasonable period of time," and in five states "stays are routinely granted during the first round of post-conviction." "It is only in Texas that execution warrants are routinely filed first round and neither automatically stayed by state law or routinely stayed by state court judges." *Id.*²⁸

²⁸ In California, capital postconviction petitioners are entitled to court-appointed counsel. Wilson and Spangenberg, *supra* note 22, at 334; 1993 ABA Counsel Study, *supra* note 9, at Executive Summary. State habeas corpus is consolidated with direct appeal, and both are filed in the State Supreme Court. *In re Clark*, 855 P.2d 729, 750-54 (Cal. 1993) (citing Policies, standards 1-1.1, 1-1.2, and 1-1.3 of the State Supreme Court). Trial judges, by law, cannot set executions until the conclusion of State direct appeal. See Cal. Penal Code § 1243 (West 1982). In practice, even if the State Supreme Court decides the direct appeal first, no execution dates are set; or if set, they are stayed. See 1993 ABA Counsel Study, *supra* note 9, at Executive Summary. California now is having problems obtaining counsel for the consolidated direct appeal and postconviction proceedings, but, unlike Texas, it stays executions until counsel can be obtained. *Id.*

The four federal district courts in California have established similar local rules governing capital habeas cases. See C.D. Cal. R. 26; E.D. Cal. R. 191; N.D. Cal. R. 296; S.D. Cal. R. 9.3. When state appellate counsel is not available to represent a petitioner, the California Appellate Project ("CAP") prepares and files on

These sources of a national consensus establish that Texas' execution scheduling practices are neither fair nor necessary to move capital postconviction cases at a reasonable pace.²⁹ The practices of California, *see supra* note

behalf of petitioner a *pro se* request for appointment of counsel and for a temporary stay of execution to permit a "Selection Board" to recommend a qualified attorney. *See Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992). The "appointment of counsel" stay lasts for 45 days, unless extended by the Court. *See* C.D. Cal. R. 26.8.7(b); E.D. Cal. R. 191(b)(2); N.D. Cal. R. 296-8(b); S.D. Cal. R. 9.3(b)(8)(b). When state counsel continues into federal court, s/he must normally prepare and file a petition in order to obtain a stay, which will last until final disposition of the matter in the district court. *See* C.D. Cal. R. 26.8.7(a); E.D. Cal. R. 191(h)(1); N.D. Cal. R. 296-8(a); S.D. Cal. R. 9.3(b)(8)(a).

Newly-appointed counsel can obtain a "preparation of the petition" stay by filing a document called a specification of nonfrivolous issues. This stay is for 120 days, but may be extended upon a showing of good cause. *See* C.D. Cal. R. 26.8.6(c); E.D. Cal. R. 191(h)(3); N.D. Cal. R. 296-8(c); S.D. Cal. R. 9.3(b)(8)(c). Upon the filing of the petition, a stay pending final disposition in the district court issues. *See* C.D. Cal. R. 26.87(a); E.D. Cal. R. 191(h)(1); N.D. Cal. R. 296-8(a); S.D. Cal. R. 9.3(b)(8)(a).

²⁹ Other states have addressed the delay problem by adopting compromise plans, like California's, designed to ensure that defendants receive postconviction counsel while also restricting the time period in which postconviction claims may be brought. In Florida, for example, the State Supreme Court promulgated a new Rule of Criminal Procedure, Rule 3.851, modifying its Rule of Criminal Procedure 3.850, effective January 1, 1994. The two rules require that petitions for state postconviction relief be filed within one year from the time the judgment and sentence become final on direct appeal in the Florida Supreme Court or by denial of certiorari by this Court. The rules also require appointment of counsel within thirty days after judgment and sentence become final, to begin addressing the prisoner's postconviction issues. If a death warrant is signed before expiration of the statute of limitations, the Florida Supreme Court will, upon a defendant's request, grant a stay of execution to allow any post-conviction relief motions to proceed in a timely and orderly manner. *Id.* By providing counsel to capital postconviction petitioners and imposing these time limits, Florida has taken important steps to resolve its capital representation problem, which, in the 1980s, was very similar to the current

28, and Florida, *see supra* note 29, are particularly instructive because these two states have death row populations that are comparable to that of Texas. *See* NAACP Leg. Def. and Educ. Fund, Inc., *Death Row, U.S.A.*, Fall 1993, at 13 (California: 375), 17 (Florida: 331).

IV. THIS COURT'S HABEAS CORPUS JURISPRUDENCE DEMONSTRATES THE CRITICAL IMPORTANCE IN VINDICATING CONSTITUTIONAL RIGHTS OF HAVING BOTH COUNSEL THROUGHOUT THE STATE AND FEDERAL POSTCONVICTION PROCESS AND A REASONABLE TIME TO INVESTIGATE, PREPARE AND PRESENT CLAIMS

The capital postconviction decisions of this Court demonstrate (1) that capital postconviction law is extraordinarily complex, substantively and procedurally;³⁰ (2) that postconviction vindication of basic constitutional rights often depends upon extra-record evidence;³¹ (3) that, for these (and other) reasons, *pro se* petitioners are not capable postconviction litigators,³² especially when

Texas crisis. *See, e.g.,* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U.L. Rev. 518, 567-85 (1988).

Florida's solution is not unique. At least eight other states have set specific periods of limitation, either by statute or court rule, in order to avoid delays. 1993 ABA Counsel Study, *supra* note 9, at Executive Summary.

³⁰ *See* discussion *infra* at 22-26. *See also Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (noting "complexity of our jurisprudence" in capital habeas corpus proceedings).

³¹ *See, e.g., Amadeo v. Zant*, 486 U.S. 214 (1988); *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986).

³² *See Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (citation omitted) ("As Justice Stevens observes, a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings. The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."). Furthermore, death row inmates often suffer from

execution is imminent and they must simultaneously litigate the merits of claims and seek stays of execution; and (4) therefore, having postconviction counsel in state and federal court, and a reasonable time to investigate, prepare and present capital claims, is essential to enforce constitutional rights. Some of the habeas corpus decisions of the Court that support these four contentions are discussed immediately below.

In *Amadeo v. Zant*, 486 U.S. 214 (1988), a unanimous Court reversed an Eleventh Circuit decision that had denied Amadeo habeas corpus relief. A local prosecutor had instructed the jury commissioner "to underrepresent black people and women on the master jury lists" from which Amadeo's grand jury and petit jury had been drawn. *Id.* at 217. At a federal habeas evidentiary hearing, Amadeo's postconviction lawyers, one of whom had represented him continuously in the postconviction process,³³ established the fact-based "cause" and "prejudice" that excused Amadeo's failure to raise the jury issues before indictment and voir dire,³⁴ and introduced extra-record evidence of the underlying underrepresentation scheme. *Id.* at 219. This Court reversed the Circuit Court for failing to give appropriate weight to the District Court's evidentiary findings.

In 1982-83, Alvin Ford "was reporting that 135 of his friends and family were being held hostage in the prison" and that prison guards, acting in conspiracy with the Ku Klux Klan, "had been killing people and putting the bodies in the concrete enclosures used for beds."

mental or emotional disabilities. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 404 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 307-308 (1989).

³³ *Amadeo v. State*, 384 S.E.2d 181, 181 (Ga. 1989). In this 1989 decision, rendered after this Court's *Amadeo* decision, the Georgia Supreme Court noted that one of Amadeo's lawyers had represented him for ten years. *Id.*

³⁴ State law imposed these time limits. *Amadeo v. Zant*, 486 U.S. at 218 n.2.

Ford v. Wainwright, 477 U.S. 399, 402 (1986). Without representation of counsel prior to filing his federal habeas corpus petition and time to investigate and present his constitutional claims, Ford could not have developed the extra-record evidence of his insanity,³⁵ challenged the testimony of three State psychiatrists who summarily and collectively "examined" him,³⁶ or researched and marshaled the centuries-old common law tradition that persuaded this Court to hold that the "Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* at 409-10.³⁷ In addition, without counsel, Ford surely would have been executed before this Court could have considered and resolved the important issues that he presented.³⁸

With legal representation provided well prior to filing his federal habeas corpus petition,³⁹ Samuel Johnson suc-

³⁵ His insanity developed after conviction and imposition of sentence. *Ford v. Wainwright*, 477 U.S. at 401-02.

³⁶ *Id.* at 403-04.

³⁷ The Court also found unconstitutional Florida's procedures for determining whether death-sentenced prisoners are competent to be executed. *Id.* at 410-418. See also *id.* at 424 (Powell, J., concurring); *id.* at 427 (O'Connor, J., concurring).

³⁸ Prior to this Court's *Ford* decision, Ford's postconviction attorneys obtained orders staying two scheduled executions. See *Ford v. Strickland*, 676 F.2d 434, 437 (11th Cir. 1982); *Ford v. Wainwright*, 477 U.S. at 404; Response to Petition for Writ of Habeas Corpus, *Ford v. Wainwright*, No. 84-6493-Civ-NCR (S.D. Fla. May 29, 1984), cited in Joint Appendix, at 26-27, *Ford v. Wainwright*, 477 U.S. 309 (1986) (No. 85-5542). When this Court granted Ford relief, one of his attorneys had been representing him for over five years. See *Ford v. State*, 407 So. 2d 907, 907 (Fla. 1981); *Ford v. Wainwright*, 451 So. 2d 471, 473 (Fla. 1984); *Ford v. Wainwright*, 752 F.2d 526, 526 (11th Cir. 1985); *Ford v. Wainwright*, 477 U.S. at 401.

³⁹ The lawyer who represented Johnson on the direct appeal of his conviction, see *Johnson v. State*, 511 So. 2d 1333, 1335-36 n.1 (Miss. 1987), continued to represent Johnson throughout the next two years, including during the state habeas proceedings, *id.*, and

cessfully challenged his death penalty because it was based in part on an unrelated, illegally imposed New York felony conviction. *Johnson v. Mississippi*, 486 U.S. 578 (1988). Postconviction lawyers conducted the extra-record investigation that revealed that Johnson's New York sentence was illegal, and then initiated the New York proceeding that invalidated it. See *People v. Johnson*, 506 N.E.2d 1177, 1178 (N.Y. 1987); *Johnson v. State*, 511 So. 2d 1333, 1337 (Miss. 1987).⁴⁰

Without legal representation and adequate time, Johnny Penry could not have vindicated, through federal habeas corpus, his constitutional right to have his capital sentencer consider important nonstatutory mitigating evidence: that Penry's IQ was "between 50 and 63"; that he had "the mental age of a 6½-year-old"; that his "ability to function in the world was that of a 9-or 10-year-old"; and that he had been physically abused as a child. *Penry v. Lynaugh*, 492 U.S. 302, 307-309, 312 (1989).

In three cases, counsel for Dale Yates analyzed and applied a variety of complex constitutional and criminal law principles first to identify an erroneous burden-shifting jury charge; then to establish that the decision invalidating such instructions applied retroactively; and finally to persuade this Court that the error was not harmless. See *Yates v. Aiken*, 474 U.S. 896 (1985); *Yates v. Aiken*, 484 U.S. 211, 216-18 (1988); *Yates v. Evatt*, 111 S. Ct. 1884, 1891-97 (1991).

With prefilings representation, and through federal habeas corpus, William Cartwright successfully challenged

the final successful appeal to this Court, although he did not argue the case in this Court. *Johnson v. Mississippi*, 486 U.S. 578, 580 (1988).

⁴⁰ Postconviction counsel also obtained orders staying two scheduled executions so that they could investigate and present Johnson's ultimately successful federal habeas corpus claims. See Joint Appendix, Chronological List of Relevant Docket Entries at 1-2, *Johnson v. Mississippi*, 486 U.S. 578 (1988) (No. 87-5468).

the finding that his homicide was "especially heinous, atrocious, or cruel." *Maynard v. Cartwright*, 486 U.S. 356, 359-60 (1988). Counsel argued that the Oklahoma Court of Criminal Appeals had not construed this enhanced aggravating circumstance in a way that sufficiently channeled the discretion of the capital sentencer.

Similarly, it was only with prefilings representation, and through federal habeas corpus, that Robert Parker enforced the constitutionally based obligation supreme courts have in "balancing" states to reweigh aggravating circumstances against nonstatutory mitigating evidence after they strike an aggravating circumstance. *Parker v. Dugger*, 498 U.S. 308 (1991).⁴¹

The Court granted James Hitchcock's habeas corpus petition because Hitchcock's lawyer, who had represented him for over five years, established that the sentencing judge had erroneously believed that he could not consider evidence that might establish nonstatutory mitigating circumstances and because he so instructed the sentencing jury. *Hitchcock v. Dugger*, 481 U.S. 393 (1987).⁴²

Habeas cases in which petitioners failed to prevail are as instructive as cases in which they prevailed. For example, in *McCleskey v. Zant*, 499 U.S. 467 (1991), the

⁴¹ Robert Link was Parker's counsel on direct appeal of his conviction in 1984, and he represented Parker for seven years, throughout the state and federal postconviction process. See *Parker v. State*, 458 So. 2d 750, 751 (Fla. 1984); *Parker v. State*, 491 So. 2d 532, 532 (Fla. 1986); *Parker v. Dugger*, 876 F.2d 1470, 1471 (11th Cir. 1989); *Parker v. Dugger*, 498 U.S. 308, 309 (1991). Parker's postconviction attorney also obtained orders staying two executions prior to this Court's 1991 decision.

⁴² Hitchcock's postconviction lawyers obtained an affidavit from his trial attorney that supported their contention that the trial attorney believed he was legally precluded from producing nonstatutory mitigating evidence at Hitchcock's sentencing hearing. Hitchcock's postconviction attorneys also proffered to the District Court "significant evidence of nonstatutory mitigating factors [that] could have been presented at his sentencing hearing" *Hitchcock v. Wainwright*, 745 F.2d 1332, 1344 (11th Cir. 1984) (Johnson, J., dissenting), *aff'd en banc*, 770 F.2d 1514 (1985).

Court held that McCleskey had abused the writ by failing to allege a claim in his first habeas petition that he asserted in his second, based on newly discovered evidence. The district court had granted the writ, holding that McCleskey had not abused the writ because, when he filed his first petition, he had not known about a series of facts that helped establish the claim and, therefore, he had not deliberately withheld the claim. *Id.* at 475. The Eleventh Circuit reversed, and this Court affirmed the Eleventh Circuit decision. This Court's analysis of its abuse-of-the-writ doctrine provides compelling support for providing first-time habeas petitioners with counsel to draft that petition and for giving counsel reasonable time to investigate and present habeas corpus claims. To establish "cause" for a first petition omission, "petitioner must [have] conduct[ed] a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." If what petitioner later learns "supports a claim for relief in a federal habeas petition," but "*could [have been] discover[ed] upon reasonable investigation,*" petitioner may not assert the claim in a second habeas petition. *Id.* at 497-98 (emphasis added).

If habeas corpus petitioners are to be bound by what they "could discover upon reasonable investigation," they should be given the assistance of counsel guaranteed by federal statutes and reasonable time to conduct that "reasonable investigation." When they are, they often prevail in this Court. When, as in Texas, they are not, some will be executed even though their convictions or sentences were imposed unconstitutionally.

V. AFFIRMANCE OF THE FIFTH CIRCUIT'S DECISION IN THIS CASE WILL UNDERMINE THE ADMINISTRATION OF JUSTICE WITHOUT ADVANCING ANY LEGITIMATE COUNTERVAILING STATE INTEREST

Affirming the Fifth Circuit's decision will, we believe, sanction unfairness and chaos. Many *initial* habeas corpus appeals in the Fifth Circuit hereafter would be reviewed

under emergency timetables imposed by imminent state execution dates. Breathtaking expedition in such important matters with so little information cannot adequately assure both the substance and the appearance of justice in capital cases. With growing death row populations, disruption of the state and federal judicial systems occasioned by such expedited review would become more frequent in years to come. Moreover, if the Court affirms in this case, it may encourage other death penalty states to replicate the process that produced this case.

Plainly, expedition rules like the Fifth Circuit's *increase* the need for counsel. This Court's language in *Barefoot v. Estelle*, 463 U.S. 880 (1983), recognized this enhanced need by making counsel a predicate to upholding a *Barefoot*-style procedure. Unlike McFarland, Barefoot had counsel, and at the district court hearing his attorney "was allowed unlimited time to discuss any matter germane to the case." *Id.* at 886. Moreover, after the district court denied relief, Barefoot's attorney had "71 days to prepare the briefs and arguments" for presentation to the Fifth Circuit. *Id.* at 890. In denying relief, the Fifth Circuit specifically noted that Barefoot "is represented here, as he has been throughout the habeas corpus proceedings in state and federal courts, by a competent attorney experienced in this area of the law." *Id.* at 891 (quoting *Barefoot v. Estelle*, 697 F.2d 593, 599-600 (5th Cir. 1983)).

To require, as the lower court did in this case, that a *pro se* habeas corpus petitioner who has not voluntarily waived counsel litigate the merits of his capital claims in accelerated fashion ignores this Court's explicit warning in *Barefoot* that it would uphold accelerated procedures "provided that *counsel* has *adequate opportunity* to address the merits and knows that he is expected to do so." *Id.* at 894 (emphasis added).

The Court has long and properly insisted that capital cases be surrounded by the strictest standards to ensure procedural fairness. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977); *Lockett v. Ohio*, 438 U.S.

586, 603-604 (1978); *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980); *Eddings v. Oklahoma*, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring). The Fifth Circuit's decision in this case validates a process that is completely inconsistent with this fundamental principle.

We can identify no legitimate countervailing interest. Texas surely can have no legitimate interest in procedures so expedited that identification and redress of constitutional violations are virtually impossible.⁴³ Although Texas plainly has an interest in assuring that constitutionally imposed executions are carried out without unnecessary delay, that does not include "delay" that is "needed for review of constitutional claims." Powell Committee Report, *supra*, at 1. Many states, by court rule or statute, have enacted statutes of limitations that require capital postconviction petitioners to promptly file claims.⁴⁴

VI. THE TWO-PART NATIONAL CONSENSUS, THIS COURT'S HABEAS CORPUS JURISPRUDENCE, AND THE UNFAIR AND CHAOTIC CONSEQUENCES OF AFFIRMANCE, ALL SUPPORT PETITIONER'S CONSTRUCTION OF THE FEDERAL STATUTES AT ISSUE IN THIS CASE

The ABA believes that the statutory construction arguments in Petitioner's Brief regarding 28 U.S.C. § 2251, 21 U.S.C. § 848(q)(4)-(10) and 28 U.S.C. § 1651 are sound as a matter of legislative language and history. The ABA adds only that the statutory interpretation proposed by Petitioner gains compelling force from consideration of the congressional purpose in enacting habeas corpus: to protect federal constitutional rights. *Cf., e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 (1985) (emphasis added) ("This Court has recog-

⁴³ Nothing in our submission to this Court is meant to suggest that the federal courts should be denied the procedural means to dispose summarily of frivolous or repetitive petitions submitted by condemned prisoners merely to delay their executions.

⁴⁴ See *supra* notes 28, 29. Counsel is provided to all capital post-conviction petitioners in these states, however.

nized that there is 'a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the [IRS] if [this] authority is necessary for the *effective enforcement* of the revenue laws and is not undercut by contrary legislative purposes.'"); *California v. American Stores Co.*, 495 U.S. 271, 295 (1990) (emphasis added) ("These principles unquestionably support a construction of the statute that will enable a chancellor to impose the *most effective*, usual and straightforward remedy to rescind an unlawful purchase of stock or assets").

In construing these statutes, this Court must assume Congress intended them to be effective. See, e.g., *Tiffany Fine Arts*, 469 U.S. at 318; *American Stores*, 495 U.S. at 295. The two-part national consensus described in this Brief, as well as this Court's habeas jurisprudence, establishes that the only way to give these statutes effect is to grant the relief Petitioner requests. Congress recognized that there was a capital representation problem when it enacted § 848(q)(4)-(10) (the right to counsel provisions). In offering amendments that now are codified in these subsections, Representative Conyers said "that it is becoming *increasingly difficult to identify counsel throughout the country willing and able to accept the appointment* in a growing number of capital cases for which representation is required." He added that, because "[c]apital cases involve a complex and highly specialized body of law and procedures, . . . this amendment is essential to reduc[e] the amount of litigation associated with capital cases while providing *maximum protection of the defendants' constitutional rights*." 134 Cong. Rec. 22,996 (1988) (emphasis added).

In enacting § 848(q)(4)-(10), Congress intended to *effectively* resolve the federal habeas counsel problem and protect constitutional rights by providing for early appointment of counsel. To hold otherwise would assume that the same Congress that decided to provide at least one attorney, and sometimes two, § 848(q)(4)(B)-(7), to every petitioner in a capital habeas "proceeding,"

§ 848(q)(4)(B), and further decided that only specially qualified "attorneys" could effectively represent capital habeas petitioners, § 848(q)(6), also decided (in the same act) that death-sentenced prisoners, themselves, would have to investigate, prepare and file habeas petitions to obtain court appointed lawyers, even if the accelerated pace of capital postconviction litigation resulted in their executions before they could obtain lawyers. Such an assumption of Congressional irrationality plainly is unwarranted.

The Court's judgment in *Murray v. Giarratano*, 492 U.S. 1 (1989), is not inconsistent with Petitioner's position in this case. The Constitutional question in *Giarratano* is not now before the Court, but the Court may be called upon to resolve that issue if this Court affirms in this case. Although in *Giarratano*, a plurality held that there is no constitutional right to counsel in capital postconviction cases, Justice Kennedy, joined by Justice O'Connor, concurred in the judgment of the Court only "[o]n the facts and record of this case." *Id.* at 15. An important, perhaps critical, fact in *Giarratano* was that in Virginia there were adequate numbers of volunteer lawyers to represent death row prisoners in postconviction proceedings. *Id.* at 14-15.

In Texas that simply is not true. Texas has run out of volunteer attorneys in many cases, at least when, as a condition of taking a capital case, they must first seek to stay imminent executions.

CONCLUSION

The ABA requests this Court to reverse the Fifth Circuit's decision and order that the district court appoint McFarland counsel and stay his execution for the reasonable period of time necessary to investigate and present his first-time postconviction claims.

Respectfully submitted,

R. WILLIAM IDE III *

President

AMERICAN BAR ASSOCIATION

750 N. Lake Shore Drive

Chicago, IL 60611

(312) 988-5000

STEPHEN H. SACHS

MICHAEL A. MILLEMANN

MICHAEL A. MELLO

JOHN E. SMITH

DAVID M. SHUB

Counsel for Amicus Curiae

* Counsel of Record

(15)
No. 93-6497

Supreme Court, U.S.

FILED

FEB 11 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,

Petitioner,

vs.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

*Attorneys for Amicus Curiae
Criminal Justice Legal Foundation*

BEST AVAILABLE COPY

40122

QUESTION PRESENTED

Does a federal district court have the jurisdiction to stay the execution of a state death penalty judgment prior to the filing of a habeas corpus petition?

TABLE OF CONTENTS

Question presented	i
Table of authorities	v
Interest of <i>amicus curiae</i>	1
Summary of facts and case	2
Summary of argument	2
Argument	3

I

Section 2251 is the sole authority for staying an execution	3
A. The All Writs Act	4
1. <i>Dean Foods</i>	4
2. Supreme Court stays	6
B. The Anti-Drug Abuse Act of 1988	9
1. Statutory interpretation	9
2. No independent authority	11

II

A proceeding is "pending" under § 2251 when the petition is filed and not before	13
---	----

III

The application for stay and counsel cannot be "deemed" to be a petition	18
---	----

IV

Practical alternatives exist	22
--	----

V

The Fifth Circuit's decision protects important interests	25
--	----

VI

<i>Demosthenes v. Baal</i> accurately summarizes the controlling principles	29
Conclusion	30

TABLE OF AUTHORITIES

Cases

Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U. S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970)	6, 22
Baldwin County Welcome Center v. Brown, 466 U. S. 147, 80 L. Ed. 2d 196, 104 S. Ct. 1723 (1984)	19, 20
Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983)	21, 24, 29
Brecht v. Abrahamson, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)	17, 29
Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953)	20
Brown v. Vasquez, 952 F. 2d 1164 (CA9 1991)	13, 17
Citizens Concerned for Separation of Church and State v. City and County of Denver, 628 F. 2d 1289 (CA10 1980)	15
California v. Velasquez, 445 U. S. 1301, 63 L. Ed. 2d 595, 100 S. Ct. 1333 (1980)	6
Camping Construction Co. v. District Council of Iron Workers, 915 F. 2d 1333 (CA9 1990)	4
Clark v. Busey, 959 F. 2d 808 (CA9 1992)	5
Continental Illinois National Bank v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595 (1935)	6, 12
Demosthenes v. Baal, 495 U. S. 731, 109 L. Ed. 2d 762, 110 S. Ct. 2223 (1990)	21, 29, 30
Duckworth v. Serrano, 454 U. S. 1, 70 L. Ed. 2d 1, 102 S. Ct. 18 (1981)	25

Engle v. Isaac, 456 U. S. 107, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982)	16, 25, 26, 27
Ex parte Kearney, 7 Wheat. (20 U. S.) 38, 5 L. Ed. 391 (1822)	26
Ferguson v. Skrupa, 372 U. S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963)	26
FTC v. Dean Foods Co., 384 U. S. 597, 16 L. Ed. 2d 802, 86 S. Ct. 1738 (1966)	4, 5
Gondeck v. Pan American World Airways, Inc., 382 U. S. 25, 15 L. Ed. 2d 21, 86 S. Ct. 153 (1965)	8
Gosch v. Collins, 8 F. 3d 20 (CA5 1993)	24
Harris v. Nelson, 394 U. S. 286, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969)	17
Hensley v. Municipal Court, 411 U. S. 345, 36 L. Ed. 2d 294, 93 S. Ct. 1571 (1973)	17
Herrera v. Collins, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993)	27
Hickman v. Taylor, 329 U. S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947)	28
Hill v. Lockhart, 474 U. S. 52, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985)	21
Hilton v. Braunskill, 481 U. S. 770, 95 L. Ed. 2d 724, 107 S. Ct. 2113 (1987)	18
Holiday v. Johnston, 313 U. S. 342, 85 L. Ed. 1392, 61 S. Ct. 1015 (1941)	20
In re Blodgett, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992)	28
In re Connaway, 178 U. S. 421, 44 L. Ed. 1134, 20 S. Ct. 951 (1900)	14, 15

ITT Community Develop. Corp. v. Barton, 569 F. 2d 1351 (CA5 1978)	5
Kline v. Burke Construction Co., 260 U. S. 226, 67 L. Ed. 226, 43 S. Ct. 79 (1922)	6
Land v. Florida, 377 U. S. 959, 12 L. Ed. 2d 503, 84 S. Ct. 1635 (1964)	7
Lenhard v. Wolff, 443 U. S. 1306, 61 L. Ed. 2d 885, 100 S. Ct. 3 (1979)	7
Lewis v. Jeffers, 497 U. S. 764, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990)	16
Marino v. Ragen, 332 U. S. 561, 92 L. Ed. 170, 68 S. Ct. 240 (1947)	25
McClellan v. Carland, 217 U. S. 268, 54 L. Ed. 762, 30 S. Ct. 501 (1910)	5
McCleskey v. Zant, 499 U. S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991)	17, 26, 27, 28
McFarland v. Collins, 7 F. 3d 47 (CA5 1993)	2
McFarland v. State, 845 S. W. 2d 824 (Tex. Crim. App. 1992)	2
McFarland v. Texas, 124 L. Ed. 2d 686, 113 S. Ct. 2937 (1993)	2
Mitchum v. Foster, 407 U. S. 225, 32 L. Ed. 2d 705, 92 S. Ct. 2151 (1972)	11, 12
Murray v. Carrier, 477 U. S. 478, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)	26
New York Times Co. v. Jasclevich, 439 U. S. 1317, 58 L. Ed. 2d 25, 99 S. Ct. 6 (1978)	8
New York Times Co. v. Jasclevich, 439 U. S. 1331, 58 L. Ed. 2d 38, 99 S. Ct. 11 (1978)	8

Regional Rail Reorganization Act Cases, 419 U. S. 102, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974)	10
Republican State Central Committee of Arizona v. Ripon Society, 409 U. S. 1222, 34 L. Ed. 2d 717, 93 S. Ct. 1475 (1972)	5
Roche v. Evaporated Milk Assn., 319 U. S. 21, 87 L. Ed. 1185, 63 S. Ct. 938 (1943)	5
Studebaker Corp. v. Gittlin, 360 F. 2d 692 (CA2 1966)	18
Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989)	16
United States v. Ohio Power Co., 353 U. S. 98, 1 L. Ed. 2d 683, 77 S. Ct. 652 (1957)	8
Whitmore v. Arkansas, 495 U. S. 149, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990)	21
Whitney Nat. Bank v. Bank of New Orleans & Trust Co., 379 U. S. 411, 13 L. Ed. 2d 386, 85 S. Ct. 551 (1965)	5
Woodard v. Hutchins, 464 U. S. 377, 78 L. Ed. 2d 541, 104 S. Ct. 752 (1984)	7, 27
Younger v. Harris, 401 U. S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)	5, 13

United States Statutes

21 U. S. C. § 848(q)(4)(B)	4, 9, 22, 23
21 U. S. C. § 848(q)(8)	23, 24
28 U. S. C. § 1257	6
28 U. S. C. § 1651(a)	4
28 U. S. C. § 2101(f)	6, 7, 23
28 U. S. C. § 2241	20

28 U. S. C. § 2242	21, 24
28 U. S. C. § 2251	3, 10
28 U. S. C. § 2254	21, 25
28 U. S. C. § 2283	3, 10
42 U. S. C. § 1983	11
Pub. L. No. 80-773, 62 Stat. 961-962, 966-967 (1948) . . .	7
Pub. L. No. 94-426 § 1, 90 Stat. 1334 (1976)	20
Pub. L. No. 100-690, 102 Stat. 4181, 4193 (1988)	9

State Statutes

Tex. Penal Code Ann. § 19.03(a)(2) (Vernon Supp. 1991)	2
---	---

Federal Rules of Court

28 U. S. C. § 2254, Rule 2	16, 18, 20, 21
Rule 4	16
Federal Rules of Civil Procedure, Rule 2	16
Rule 3	15, 16, 19
Rule 4	16
Rule 8	18, 21
Rule 11	18, 21
Rule 15	24
Rule 65	15, 16
Supreme Court Rule 44.2	8

Treatises

J. Liebman, Federal Habeas Corpus Practice and Procedure (1988)	13, 21
--	--------

J. Moore & J. Lucas, Moore's Federal Practice (2d ed. 1990)	14, 16
R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986)	8
C. Wright & A. Miller, Federal Practice and Procedure (1973)	15

Miscellaneous

Advisory Committee Note to 28 U. S. C. § 2254 Rule 4	21, 24
American Heritage Dictionary (3d ed. 1992)	10
Black's Law Dictionary (6th ed. 1990)	10, 15
K. Scheidegger, Rethinking Habeas Corpus (1989), reprinted in Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 1st Sess. 212 (1991)	29

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,

Petitioner,

vs.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)¹ is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves efforts to add to the already excessive delay in our capital punishment system by illegally extending the power of the federal courts to stay state judgments. Such illegal delay is contrary to the interests of victims and society that CJLF was formed to protect.

1. Both parties have consented to the filing of this brief.

SUMMARY OF FACTS AND CASE

Petitioner was convicted of murdering Terry Hokason in the course of committing an aggravated sexual assault and sentenced to death. See *McFarland v. State*, 845 S. W. 2d 824, 828-829 (Tex. Crim. App. 1992); Tex. Penal Code Ann. § 19.03(a)(2) (Vernon Supp. 1991). On September 23, 1992, the Texas Court of Criminal Appeals affirmed his conviction and sentence. *McFarland, supra*, 845 S. W. 2d, at 828.

On December 9, 1992, the Texas court denied rehearing. Opp. 3. On December 12, the same court stayed McFarland's execution to allow him time to file a certiorari petition. *Id.*, at 4.

On March 9, 1993, McFarland filed a certiorari petition, which this Court denied on June 7, 1993. *McFarland v. Texas*, 124 L. Ed. 2d 686, 113 S. Ct. 2937 (1993). On August 16, 1993, an execution date was set for September 23, 1993, exactly one year after McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. Opp. 4. This date was later moved back to October 27, 1993. *Id.*, at 5.

On October 22, 1993, McFarland, with the help of the Resource Center, filed *pro se* a Motion for Stay of Execution and for Appointment of Counsel in the District Court. This was filed without an accompanying habeas corpus petition. *Ibid.* On October 25, 1993, the District Court denied the stay and refused to grant a certificate for probable cause to appeal ("CPC") because the action was not a habeas proceeding. *Ibid.* On the same day, the Fifth Circuit denied CPC and a stay. *McFarland v. Collins*, 7 F. 3d 47, 49 (1993) (*per curiam*).

SUMMARY OF ARGUMENT

The Anti-Injunction Act is a strict prohibition of federal interference with state court proceedings, subject only to a

few narrowly construed exceptions. No exception other than 28 U. S. C. § 2251 applies to habeas corpus.

A case is not "pending" within the meaning of section 2251 until a petition is filed. A document which does not meet the minimal showing required by statute and rule cannot be "deemed" to be a petition.

Although not essential to a jurisdictional analysis, it is worth noting that practical alternatives to prefiling stays exist. Potential petitioners can apply for counsel immediately upon exhaustion of state remedies. Prompt application will provide counsel sufficient time to place all exhausted claims in petition form and obtain a stay. Omitted claims can be added by amendment.

This alternative advances the crucial state interest in avoiding unnecessary delay in the imposition of death sentences. Petitioner's proposal, if accepted, will only add to the needless delay that already plagues our capital punishment system.

ARGUMENT

I. Section 2251 is the sole authority for staying an execution.

Amicus has previously briefed to this Court our position that the Anti-Injunction Act² strictly limits the power of federal courts to stay state executions. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* supporting certiorari in *Vasquez v. Brown*, No. 91-1425, cert. denied, 118 L. Ed. 2d 435, 112 S. Ct. 1778 (1992) and *Vasquez v. Thompson*, No. 91-1930, cert. denied, 121 L. Ed. 2d 564, 113 S. Ct. 633 (1992). *Amicus* argued that

2. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgements." 28 U. S. C. § 2283.

the Anti-Injunction Act is an absolute prohibition against staying state cases, not a discretionary admonition. The prohibition is construed broadly, with only narrowly construed exceptions that do not apply to stays of execution granted before a habeas corpus petition is filed. See *Brown* Brief 3-7, *Thompson* Brief 3-7. As the Attorney General will present this argument to the Court in the present case, *amicus* will refrain from extensive briefing on the issue, and instead refers this Court to its briefs in *Brown* and *Thompson*.

Amicus will instead address petitioner's attempts to avoid the clear prohibition of the Anti-Injunction Act through the All Writs Act, 28 U. S. C. § 1651(a), and 21 U. S. C. § 848(q)(4)(B). As will be shown, neither alternative is successful. The All Writs Act cannot be used to create federal jurisdiction where none already exists, while section 848(q)(4)(B) is simply irrelevant to the issue of staying state court actions.

A. The All Writs Act.

1. *Dean Foods*.

Petitioner asserts that the District Court could have issued a stay under the All Writs Act, 28 U. S. C. § 1651(a) and *FTC v. Dean Foods Co.*, 384 U. S. 597 (1966). *Dean Foods* is distinguishable on several grounds.

First and foremost, *Dean Foods* did not involve any prohibition on injunctive relief. It was a pure case of searching for authority in the absence of any clear indication from Congress one way or the other. See *id.*, at 608. The difference between that type of case and one involving a prohibition on injunctions is critical. See, e.g., *Camping Construction Co. v. District Council of Iron Workers*, 915 F. 2d 1333, 1347 (CA9 1990).

A related distinction, and one nearly as important, is that *Dean Foods* does not involve the delicate relationship between state and federal courts. Federal injunction of state

proceedings is a grave step, never to be taken lightly. See, e.g., *Younger v. Harris*, 401 U. S. 37, 41, 43 (1971).

Finally, *Dean Foods* involved a writ issued by an appellate court in a case which had already entered the federal adjudicatory process. The Federal Trade Commission had filed a complaint and was reviewing a merger. 384 U. S., at 599. The FTC decision would eventually be reviewed by the Court of Appeals. *Id.*, at 604. The FTC, however, did not have authority to enjoin the merger. See *id.*, at 609-610. The Court of Appeals had authority to preserve the status quo under the All Writs Act, even though the proceeding was still pending before the FTC. *Dean Foods* cited as authority cases in which appellate courts had issued orders in cases pending in the lower courts, which would later be appealed. *Id.*, at 603.

The other cases cited by petitioner in support of his *Dean Foods* argument, see Brief for Petitioner 37, n. 24, are equally distinguishable. None of them involved stays of state court actions. Instead, as in *Dean Foods*, they involved writs issued by federal appellate courts in cases that had already entered the federal judicial system. See *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 22-24 (1943); *McClellan v. Carland*, 217 U. S. 268, 274-277 (1910); *Clark v. Busey*, 959 F. 2d 808, 810-811 (CA9 1992); *ITT Community Develop. Corp. v. Barton*, 569 F. 2d 1351, 1352-1353 (CA5 1978); *Republican State Central Committee of Arizona v. Ripon Society*, 409 U. S. 1222, 1222-1223 (1972) (Rehnquist, J., in chambers). These cases are a far cry from petitioner's efforts to create federal jurisdiction over state cases that are not yet in the federal system.

The principal case relied on by *Dean Foods* is *Whitney Nat. Bank v. Bank of New Orleans & Trust Co.*, 379 U. S. 411 (1965). See *Dean Foods*, 384 U. S., at 604. *Whitney* is a ringing affirmation of the legitimacy and wisdom of Congress's choice to substitute an administrative body in the place of the District Court in certain specialized areas. *Whitney*, 379 U. S., at 420-421. *Dean Foods*, 384 U. S.,

at 604, also relies on *Continental Illinois National Bank v. Chicago, R. I. & P. R. Co.*, 294 U. S. 648 (1935). That case, in turn, relies on *Kline v. Burke Construction Co.*, 260 U. S. 226 (1922) for the proposition that "a federal court, having first acquired jurisdiction of the subject matter, could enjoin the parties" 294 U. S., at 675 (emphasis added). When a state court has first acquired jurisdiction, *Dean Foods* provides no authority to enjoin it. Petitioner's interpretation of *Dean Foods* would effectively repeal the Anti-Injunction Act.

2. Supreme Court stays.

It is true that this Court and its Justices can and do issue stays of state court proceedings in cases where the certiorari petition has not yet been filed. See, e.g., *California v. Velasquez*, 445 U. S. 1301 (1980) (Rehnquist, J., in chambers). Far from supporting petitioner's case, this power and its source refute it.

This Court is unique among federal courts. It alone has appellate jurisdiction over cases arising in the state courts. 28 U. S. C. § 1257. This unique jurisdiction calls for a unique power regarding stays, see *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U. S. 281, 296 (1970), and Congress has provided one in 28 U. S. C. § 2101(f):

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court"

The contrast between the wording of this statute and the wording of section 2251 is striking and significant. The Supreme Court may grant stays in cases merely "subject to review," but the District Court on habeas corpus is limited

to granting stays when a "proceeding is pending" before that court. Both provisions were adopted in the same act: the 1948 revision of Title 28. See Pub. L. No. 80-773, 62 Stat. 961-962, 966-967 (1948).

Congress knows how to unambiguously authorize prefilings stays when it deems them necessary. The staying of a state court action which has not yet entered the federal system is a grave step. Congress has seen fit to allocate such power to this Court alone.

McFarland asserts that this Court considers the All Writs Act to be the primary source of its stay authority, but his authority for this proposition is weak. *Lenhard v. Wolff*, 443 U. S. 1306 (1979) (Rehnquist, J., in chambers) is just a single passing statement by a single Justice in a case where jurisdiction was not genuinely at issue. His other sources, *Woodard v. Hutchins*, 464 U. S. 377 (1984) (*per curiam*) and *Land v. Florida*, 377 U. S. 959 (1964) are similarly unpersuasive.

In *Woodard*, the federal courts already had jurisdiction over the case; the second habeas corpus petition was still pending in the District Court even though the lower court had vacated the stay of execution. See *id.*, at 377-378. As the habeas action was still pending in the District Court, there was no "final judgment or decree" reviewable by this Court on writ of certiorari. 28 U. S. C. § 2101(f). Therefore, the All Writs Act was necessary to preserve a case that was already before the federal courts. This is far removed from petitioner's attempt to invoke the statute to allow a federal court to acquire jurisdiction over a state action where none had previously existed.

In *Land*, this Court did deny a certiorari petition while simultaneously staying the execution to allow Land 60 days to file a habeas corpus petition in District Court. 377 U. S., at 959. A key distinction between *Land* and the present case is that Land's case had formally entered the federal court system through a certiorari petition when this Court extended the stay. When this Court denies certiorari, its jurisdiction

over a case does not end. It may decide to grant certiorari after a motion for rehearing, see Supreme Court Rule 44.2, and this Court may even reopen a case on an out-of-time petition for rehearing filed well after the initial petitions for certiorari and rehearing were denied. See *Gondeck v. Pan American World Airways, Inc.*, 382 U. S. 25, 26-27 (1965) (*per curiam*); see also *United States v. Ohio Power Co.*, 353 U. S. 98, 99 (1957). *Land*, while cryptic as to the source of its jurisdiction, is best explained as an example of this Court's continuing certiorari jurisdiction.

There is much stronger authority against petitioner's assertion. First, there is the preeminent treatise in the field. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 17.11, at 675 (6th ed. 1986) cites section 2101(f) as the authority for this Court to stay cases subject to certiorari review and mentions no others. Then, there is *New York Times Co. v. Jascalevich*, 439 U. S. 1317 (1978), in which Justice White, in chambers, recognized that section 2101(f) was the source of authority for a stay of a state court action. *Id.*, at 1318. Because that section applies only to final judgments, a long finality analysis was necessary. *Id.*, at 1318-1322. Justice Marshall followed the same path on a successive application three days later. *New York Times Co. v. Jascalevich*, 439 U. S. 1331, 1332-1334 (1978). If *Dean Foods*, in which Justice White participated and which Justice Marshall personally argued as Solicitor General, provided the authority to grant a stay without the finality requirement, it seems very strange that both Justices were so concerned with finality.

Supreme Court practice thus provides no authority for a comparable power in the District Court. This Court's stay power derives from a special statute. Congress has conferred a unique power on this Court in order to discharge its unique responsibilities. Congress has also conferred a stay power on the federal habeas court, but that power is worded differently. The difference is intentional.

B. *The Anti-Drug Abuse Act of 1988.*

Petitioner and supporting *amici* assert that Title 7, section 7001 of the Anti-Drug Abuse Act of 1988, 21 U. S. C. § 848(q)(4)(B) (Pub. L. No. 100-690, 102 Stat. 4181, 4193 (1988)), provides federal district courts with the authority to stay state executions before a habeas corpus petition has been filed. First, they argue that the provision for counsel under section 848(q)(4)(B) creates a right to counsel that can be protected only by interpreting the All Writs Act and section 2251 to allow federal district courts to issue prefiling stays of execution. See Brief for Petitioner 32-36, 39; Brief for American Civil Liberties Union ("ACLU Brief") as *Amicus Curiae* 10-14; Brief for American Bar Association ("ABA Brief") as *Amicus Curiae* 28-29. Second, petitioner also asserts that section 848(q)(4)(B) creates an independent exception to the Anti-Injunction Act. Brief for Petitioner 45-47.

Neither contention is sound. Both ignore the unavoidable fact that section 848(q)(4)(B) does not address the subject of stays. It is too far a stretch to imply jurisdiction for federal courts to stay executions from the straightforward language of section 848(q)(4)(B).

1. *Statutory interpretation.*

Petitioner argues that his request for appointed counsel and a stay of execution creates a pending habeas corpus action that triggers the jurisdiction to grant stays under section 2251. Brief for Petitioner 32-36. This is contrary to the common understanding of what constitutes a pending action. See *post*, at 13-18. Section 848(q)(4)(B) cannot be used to overcome this common sense interpretation.

McFarland notes that he is entitled to counsel under section 848(q)(4)(B) before a habeas petition is filed. Brief for Petitioner 21-29. He also notes that section 848(q)(4)(B) allows for the appointment of counsel "during the pendency of any 'post conviction proceeding'" *Id.*, at 33, quoting 21 U. S. C. § 848(q)(4)(B). Section 2251, in very

similar language, authorizes district courts "to enter a stay during any 'habeas corpus proceeding.'" *Ibid.*, quoting 28 U. S. C. § 2251. From this he reasons that a "habeas corpus proceeding" triggering authority to grant a stay under section 2251, like a "post-conviction proceeding" under section 848(q)(4)(B), can occur before a habeas petition is filed. *Id.*, at 33-36.

This definition of habeas "proceeding" is contrary to the definition given by Congress. Although "proceeding" is not formally defined by statute, section 2254(d) states "[i]n any proceeding *instituted* in a Federal court *by an application* for a writ of habeas corpus" (Emphasis added). To institute means to "begin," American Heritage Dictionary 936 (3d ed. 1992) or "to bring something into existence," *id.*, at 717 (synonym note at "found"). Thus, there is no habeas "proceeding" until the petition (application) is filed, see *post*, at 13-18. Defining "proceeding" by the commencement of the action is consistent with commonly accepted definitions of "proceeding." A proceeding is the "[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment." Black's Law Dictionary 1204 (6th ed. 1990).

Weighed against this straightforward definition of "habeas corpus proceeding" is petitioner's desire to use section 848(q)(4)(B) to require a different definition of "proceeding" under section 2251 for the purpose of death penalty cases. He raises this construction in spite of the fact that section 848(q)(4)(B) neither addresses the issue of stays nor directly defines "proceeding." Given the straightforward language of section 2251 and section 2254(d), petitioner's interpretation would be an unnecessary implied amendment of these provisions. Implied amendment is disfavored, and will not be found without statutory language showing "a considered determination to that end" *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134 (1974). The

appointment of counsel language in section 848(q)(4)(B) shows no such intent.

Section 848(q)(4)(B) did not change the meaning of section 2251. If Congress has authorized district courts to issue prefiling stays it would have said so directly; it does not need to use such an obscure and remote source as section 848(q)(4)(B). If a district court has any authority to issue prefiling stays, it must be found within the plain text of section 2251. As explained below, section 2251 does not provide the federal courts with the authority that petitioner desires. See *post*, at 13-18.

2. No independent authority.

Petitioner's attempt to use section 848(q)(4)(B) to carve out a new exception to the Anti-Injunction Act, 28 U. S. C. § 2283, fares no better than his attempt to reinterpret section 2251. He argues that section 848(q)(4)(B) "has 'created a specific and uniquely federal right or remedy' that not only 'could be frustrated,' but would be utterly defeated 'if the federal courts were not empowered to enjoin a state court proceeding.'" Brief for Petitioner 46, quoting *Mitchum v. Foster*, 407 U. S. 225, 237 (1972). This founders on the fact that section 848(q)(4)(B) does not provide federal courts with any equitable power.

The issue in *Mitchum* was whether the injunctive provisions of 42 U. S. C. § 1983 were exempt from the Anti-Injunction Act. See *id.*, at 226. In concluding that section 1983 was exempt, the *Mitchum* Court held that the key to exemption "is whether an Act of Congress, clearly creating a federal right or remedy *enforceable in a federal court of equity*, could be given its intended scope only by the stay of a state court proceeding." *Id.*, at 238 (emphasis added). Because section 848(q)(4)(B) contains no equitable authorization it is not exempt from the Anti-Injunction Act.

Central to the *Mitchum* Court's decision to exempt section 1983 was the fact that "Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by

expressly authorizing a 'suit in equity' as one of the means of redress." *Id.*, at 242 (emphasis added). Section 848(q)(4)(B) contains no authorization for any federal court to entertain any suits in equity.

The *Mitchum* Court noted that in addition to the bankruptcy law there were six other exceptions to the Anti-Injunction Act that had been recognized by the Court. See *id.*, at 234, 235, nn. 12-17. Three of the exceptions specifically authorized federal courts to stay state proceedings. See *ibid.*, nn. 14-16. The other three gave federal courts broad powers to stop other proceedings or claims. See *ibid.*, nn. 12, 13, 17. No such authority has been granted under section 848(q)(4)(B). It is no more than a simple appointment of counsel statute.

For the same reason, petitioner cannot invoke section 848(q)(4)(B) as a separate source of authority for relief under the All Writs Act. Power under the All Writs Act presumes that there is some action over which the federal courts have acquired subject matter jurisdiction. See *Continental Illinois National Bank v. Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 675 (1935). Section 848(q)(4)(B) creates no cause of action and thus provides no jurisdiction that would allow a federal court to invoke the All Writs Act.³

Amicus agrees with petitioner that section 848(q)(4)(B) does allow for prefiling appointment of counsel. It refers to appointment for "defendants," not petitioners, and it provides the counsel appointed for "defendants" with broad authority to represent the client. Paragraph (4)(B) explicitly incorporates paragraph (8), which clearly contemplates interstitial representation. Contrary to the claims of petition-

3. Petitioner's attempt to use section 848(q)(4)(B) to invoke the All Writs Act to protect the prospective jurisdiction of a federal court, see Brief for Petitioner 39, is just a rehash of his *Dean Foods* argument and warrants dismissal for the reasons discussed earlier. See *ante*, at 4-6.

er, it makes perfect sense to refuse to read the power to grant prefiling stays into section 848(q)(4)(B). See Brief for Petitioner 34. It is entirely logical that there is a looser requirement for appointment of counsel than for a stay. In fact for the reasons discussed in part IV, *post*, it is the practical solution to the present dilemma.

The intent of Congress is not only conceivable, it is vividly evident. The plain words of the Anti-Injunction Act and the two-century history of its strict enforcement by this Court display a powerful policy against interference with state proceedings when it is not absolutely necessary. See *Younger v. Harris*, 401 U. S. 37, 41 (1971). There is no comparable policy against appointment of counsel which, by itself, has no impact on federalism or comity at all. The sole direct impact of appointment is on the federal treasury.

In summary, none of petitioner's asserted bases of jurisdiction provides an exception to the Anti-Injunction Act. If authority for this stay exists at all, it can be found only under section 2251.

II. A proceeding is "pending" under section 2251 when the petition is filed and not before.

The crux of this case is when a habeas corpus proceeding is "pending." Authority on the question is sparse, simply because relatively few litigants have dared to ask a court for relief before they have filed a complaint.⁴ What little authority exists, however, is almost uniformly against petitioner's position. The only authority supporting McFarland's contention, *Brown v. Vasquez*, 952 F. 2d 1164 (CA9

4. Before *Brown v. Vasquez*, 952 F. 2d 1164 (CA9 1991) even the most partisan of the pro-petitioner commentators had stated that the petition was a prerequisite to federal jurisdiction. 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* ¶ 11.1, at 145 (1988).

1991), is a policy statement, not a rule of law. See *post*, at 18.

In *re Connaway*, 178 U. S. 421 (1900) appears to be the only direct authority for when an action begins so as to make it "pending." Connaway filed a complaint in the Circuit Court for the Ninth Circuit against Overton, but he was unable to serve it before Overton died. He then obtained a writ of *scire facias* to substitute the executor of Overton's estate as a party. *Id.*, at 423. A federal statute authorized the issuance of the writ "from the office of the clerk of the court where the suit is *pending*." *Id.*, at 425 (emphasis added).

The circuit court granted the executor's motion to set aside the *scire facias* on the ground that no suit had been pending at the time of Overton's death because he had not been served. *Connaway* applied to the Supreme Court for a writ of mandamus.

"When can a suit be said to be 'in any court of the United States,' or said to be 'pending' therein? Is not the answer inevitable, from the time the suit is commenced? *It cannot be pending until it is commenced*, and if it continue until the death of the 'plaintiff or petitioner or defendant,' the requirements of the section seem to be satisfied.

"Another inquiry becomes necessary — when is a suit commenced? For an answer we must go to the California statutes.⁵ By section 405 of the Code of Civil Procedure, it is provided: 'Civil actions in the courts of this State are commenced by filing a complaint.' By section 406 summons may be issued at any time within a year, and if necessary to differ-

5. At this time federal courts adopted the procedural statutes of the states in which they sat, absent an applicable federal statute. See 2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 1.02[1], at 1-5 (2d ed. 1990).

ent counties. The defendant may appear, however, at any time within a year. *The filing of the complaint, therefore, is the commencement of the action and the jurisdiction of the court over the case.*" *Id.*, at 427-428 (emphasis added).

Connaway thus squarely holds that in a court governed by a commencement rule equivalent to former section 405 of the California Code of Civil Procedure, a suit is not in the court and is not "pending" until the complaint is filed. Rule 3 of the Federal Rules of Civil Procedure ("FRCP") is indistinguishable from the statute construed in *Connaway*: "A civil action is commenced by filing a complaint with the court."

This is consistent with the commonly accepted legal definition of "pending": "*Begun*, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment Thus, an action or suit is 'pending' from its inception until the rendition of final judgment." Black's Law Dictionary 1134 (6th ed. 1990) (emphasis added).

The federal authority regarding injunctions in civil matters is consistent with the view that a habeas proceeding is not pending until a petition is filed. The federal law on preliminary injunctions, FRCP 65, contains no independent grant of authority for the use of federal power. See *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F. 2d 1289, 1299 (CA10 1980) (Rule 65 "has no relationship to or bearing on either the jurisdiction to exercise or the propriety of exercising the injunctive power.") "In keeping with its procedural function, Rule 65 does not confer either subject matter or personal jurisdiction on the court. As is true of civil actions generally, an independent basis for asserting federal question or diversity jurisdiction must be shown" 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2941, at 362-363 (1973) (citations omitted). Rule 65 merely provides the procedure to be used for the issuance of injunctions in the

"civil action" governed by the Federal Rules. FRCP 2 states: "There shall be one form of action to be known as 'civil action.'" FRCP 3 states: "A civil action is commenced by filing a complaint with the court."

The "complaint" in habeas corpus is the petition. Compare 28 U. S. C. § 2254 Rule 2(c) ("Habeas Rules") ("specify all the grounds of relief . . .") with FRCP 8(a)(2) ("a short and plain statement of the claim . . ."). As Habeas Rule 4 recognizes, there may not be any substantial federal question. Each of the petitioner's claims may be either (1) not truly federal, see *Engle v. Isaac*, 456 U. S. 107, 119 (1982); (2) precluded by state court fact-finding, see *Lewis v. Jeffers*, 497 U. S. 764, 780 (1990); (3) proposals for "new rules" precluded by *Teague v. Lane*, 489 U. S. 288 (1989); or (4) simply insubstantial.

The requirement that an action be pending is clearly implicit in subdivision (d) of Rule 65. "Every order granting an injunction . . . is binding only upon the parties to the action . . ." and persons in privity with parties. If there is no action there can be no parties, and no one is bound by the injunction.

"Where such party [to be enjoined] is a defendant, jurisdiction over the defendant implies either voluntary appearance by him or effective service of process." 7 Moore, *supra*, ¶ 65.03[3], at 65-27 and 65-28. The process to be served is the summons and complaint together in a regular civil action, FRCP 4(d), and it is the petition in a habeas case, Habeas Rule 4. Without service there is no jurisdiction, and again the person sought to be enjoined is not legally bound.

At the time the stay of execution was requested in the present case, Director Collins was not a "part[y] to the action." FRCP 65. He had not been served with a habeas corpus petition or any other process which would make him a party to the action. No one had been made a party respondent or defendant at that time, because no action had commenced.

Brown v. Vasquez, 952 F. 2d 1164 (CA9 1991) ignored these authorities. The *Brown* Court felt that the "underlying purpose of the writ of habeas corpus requires us to view the application for appointment of counsel as triggering the pendency of a habeas proceeding." *Id.*, at 1169. The Ninth Circuit relied on aphorisms to support this conclusion. It noted this Court's dictum that " '[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.' " *Id.*, at 1166, quoting *Harris v. Nelson*, 394 U. S. 286, 290-291 (1969); but see *Brecht v. Abrahamson*, 123 L. Ed. 2d 353, 370, 113 S. Ct. 1710, 1719 (1993) ("Direct review is the principal avenue for challenging a conviction." Federal habeas corpus "is secondary and limited."). In addition to this statement, the Ninth Circuit justified its result by noting that habeas corpus should be administered with " 'initiative and flexibility,' " 952 F. 2d, at 1166, quoting *Harris, supra*, 394 U. S., at 291, and that it must reject interpretations of the habeas statutes " 'that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements,' " 952 F. 2d, at 1166, quoting *Hensley v. Municipal Court*, 411 U. S. 345, 350 (1973).

Finally, the Ninth Circuit noted that this Court's decision to limit successive habeas petitions in *McCleskey v. Zant*, 499 U. S. 467 (1991) made it imperative for habeas petitioners to make all their claims in the first petition, making habeas counsel all the more necessary for the death penalty prisoner. See 952 F. 2d, at 1166-1169. In an argument very reminiscent of those given by petitioner and supporting *amici* in the present case, the Ninth Circuit concluded that a prefiling stay was justified in order to allow habeas counsel to be found for the death row prisoner. *Id.*, at 1168-1169.

This decision was motivated entirely by policy considerations, with no pertinent analysis of habeas procedure or the authorities on what constitutes a pending case. It simply chose to ignore the strong analogy from the FRCP, see *id.*,

at 1169, n. 13, in spite of this Court's recognition of the FRCP's importance in determining appropriate habeas procedure. "Where, as here, the need is evident for principles to guide the conduct of habeas proceedings, it is entirely appropriate to 'use . . . [general civil] rules by analogy or otherwise.'" *Hilton v. Braunskill*, 481 U. S. 770, 776, n. 5 (1987), quoting *Harris, supra*, 394 U. S., at 294. *Brown* gave no reason for its definition of pendency, other than a desire to reach an intended result. The decision was a statement of policy not a rule of law, and should be formally disapproved.

III. The application for stay and counsel cannot be "deemed" to be a petition.

Any notion that a request for stay and counsel can be deemed a habeas petition is simply wrong. *Amicus* has found only one other case supporting such an exercise, and the situation there was quite different. In *Studebaker Corp. v. Gittlin*, 360 F. 2d 692 (CA2 1966), *Studebaker* was served with state court process on March 21. The next day, March 22, it filed in federal court an order to show cause "supported by an extensive affidavit." *Id.*, at 694. The hearing was held March 23, the complaint was filed March 24, and the injunction issued March 25. *Ibid.*

Under these circumstances, where the federal plaintiff needed relief within a few days of learning of the state court action, the court permitted the affidavit to be treated as a complaint. *Ibid.* An affidavit is made under oath, even though a regular civil complaint is not required to be verified. FRCP 11; cf. Habeas Rule 2(c). The court described the affidavit as "extensive," implying that it met the minimal requirement of general federal civil practice to state a "short and plain statement of the claim." FRCP 8(a)(2). Under the facts of the case, *Studebaker* is authority for no more than the proposition that a court may deem an affidavit which contains the information required in a com-

plaint to be a complaint *for the purpose of holding a hearing* on whether to grant an injunction. Whether an injunction can actually issue without an actual complaint is another question. The present case is also distinguishable in that no document coming close to serving the function of a habeas petition had been filed at the time the stay was issued.

A Supreme Court case much closer to the present facts points in the opposite direction. In *Baldwin County Welcome Center v. Brown*, 466 U. S. 147 (1984), would-be plaintiff *Brown* claimed discriminatory treatment by her former employer, the Welcome Center. After exhausting administrative remedies with the Equal Employment Opportunity Commission (EEOC), she had 90 days to bring a civil action. *Id.*, at 148. Six weeks later, *Brown* filed a copy of her EEOC "right-to-sue letter" with the District Court and requested counsel. The magistrate mailed her the required form and questionnaire and reminded her of the deadline. *Brown* returned the questionnaire on the 96th day after the right-to-sue letter. She filed an "amended complaint" on the 130th day, 40 days past the deadline. *Ibid.*

The District Court held that *Brown* had forfeited her right to judicial review by failing to file a complaint within the statutory time. Specifically, the court rejected the contention that the copy of the right-to-sue letter could be deemed a complaint. *Id.*, at 148-149. The Court of Appeals reversed on the theory that filing the letter "tolled" the statute. *Id.*, at 149. The Supreme Court reversed. *Ibid.*

First, and most importantly for the present case, this Court approved the District Court's ruling that the EEOC letter could not be deemed a complaint. This Court noted that under FRCP 3 an action is commenced by filing a complaint. The District Court had determined "that the right-to-sue letter did not qualify as a complaint under Rule 8 because there was no statement in the letter of the factual basis for the claim of discrimination, which is required by the Rule." *Id.*, at 149. Upholding this ruling, the high court rejected the Court of Appeals' notion that civil rights

plaintiffs were somehow exempt because of a special solicitude for this class of plaintiffs. *Id.*, at 149-150.

The complaint later filed, this Court went on to explain, could not "relate back" to the date of filing of the EEOC letter because that letter did not meet the very minimal requirements to constitute a complaint.

"Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' [Citations.] *Because the initial 'pleading' did not contain such notice, it was not an original pleading* that could be rehabilitated by invoking Rule 15(c)." *Id.*, at 150, n. 3 (emphasis added).

Baldwin holds, therefore, that notwithstanding the liberal rules of modern pleading, there are limits beyond which a paper cannot be considered a pleading. A mere application for counsel, or even counsel's statement of "nonfrivolous" issues, is beyond the limit for a habeas corpus petition.

The habeas corpus application or petition is not governed by FRCP 8 but rather by 28 U. S. C. § 2241 and Habeas Rule 2. The Habeas Rules are an act of Congress. Although originally promulgated by this Court, see 425 U. S. 1169, they were amended by Congress and approved as amended. See Pub L. No. 94-426 § 1, 90 Stat. 1334 (1976).

It is true, of course, that a "petition for *habeas corpus* ought not to be scrutinized with technical nicety." *Holiday v. Johnston*, 313 U. S. 342, 350 (1941). But we are dealing with essentials here, not niceties. "Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief." *Brown v. Allen*, 344 U. S. 443, 461 (1953).

Congress has quite deliberately made the initial pleading requirements more strict for habeas petitions than for civil complaints in some respects. Civil complaints are generally signed by the attorney and usually need not be verified. FRCP 11. Habeas petitions must be verified, 28 U. S. C. § 2242, or signed under penalty of perjury, Habeas Rule 2(c). The rule requires the petitioner to personally sign the petition. *Ibid.* The statute permits "next friend" petitioners, but only under very limited circumstances. See *Whitmore v. Arkansas*, 495 U. S. 149, 163-164 (1990).

In addition, Habeas Rule 2(c) retains "fact pleading" rather than the FRCP 8 "notice pleading." Advisory Committee Note to Habeas Rule 4; 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 11.4, at 149 (1988). Even Professor Liebman, who calls this requirement "curious," *ibid.*, and "anomalous," *id.*, at 149, n. 3, grudgingly acknowledges two justifications for it. "First, . . . , habeas corpus is in fact designed to review and draws heavily on the record of prior state proceedings Second, fact pleading . . . enables courts . . . to separate substantial petitions from insubstantial ones quickly and without need of adversary proceedings." *Ibid.*

The second reason is particularly pertinent here. If the petition fails to state facts which, if true, would entitle the petitioner to relief, there is nothing to consider. See *Hill v. Lockhart*, 474 U. S. 52, 60 (1985); *id.*, at 62 (White, J., concurring). If the factual basis of the claim has already been decided in a state proceeding which is binding under 28 U. S. C. § 2254(d), it is error to grant a stay. See *Demos-thenes v. Baal*, 495 U. S. 731, 737 (1990) (*per curiam*); see also *post*, at 29-30.

Barefoot v. Estelle, 463 U. S. 880, 894 (1983) established that "it is entirely appropriate that an appeal which is 'frivolous and entirely without merit' be dismissed after the hearing on a motion for a stay." Absent an unresolved factual issue, consideration of the petition by the District Court is no different.

In summary, there is an irreducible minimum below which a paper cannot be deemed a petition. It must be verified or signed under penalty of perjury. It must be signed by the petitioner absent extraordinary circumstances. It must serve the basic function of identifying the claims and their factual basis. In the next part, we will explain why Texas death row inmates can meet these requirements without prefiling stays.

IV. Practical alternatives exist.

Although fundamental principles of federal jurisdiction uniformly point to a lack of jurisdiction, petitioner attempts to justify prefiling stays with the dire prospect of a capital defendant being executed before his first federal petition could be filed. See Brief for Petitioner 35-36. There are two answers to this argument. First, jurisdictional questions do not require practical answers. Absent an exception to the Anti-Injunction Act, even an unmistakably clear interference with a protected federal right by a state court cannot be enjoined. *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U. S. 281, 294 (1970). Second, it is simply not true that prefiling stays are essential. With reasonable diligence on the part of a habeas petitioner and his attorney, this problem is readily avoidable.

Petitioner's interests can be protected more efficiently, and less drastically, by invoking 21 U. S. C. § 848(q)(4)(B) to appoint habeas counsel immediately after the prisoner's capital conviction is affirmed on direct appeal, if the state courts refuse to do so. Counsel can then spend the time between affirmance on direct appeal and denial of the prisoner's certiorari petition to prepare a habeas petition. This will provide both a legal and feasible solution to petitioner's worries.

The first advantage this proposal has over petitioner's claims is its legality. As petitioner recognizes, section 848(q)(4)(B) provides a federal court with the authority to

appoint counsel before a habeas petition is filed.⁶ This person can be either the attorney appointed to prepare the certiorari petition or a different attorney, depending upon the needs of the case. See 21 U. S. C. § 848(q)(8). The attorney appointed under this statute will also have the necessary resources to investigate and prepare the habeas petition. See § 848(q)(4)(B).⁷

Most importantly, counsel will have the necessary time. As the present case demonstrates, the Texas Court of Criminal Appeals routinely stays executions while counsel prepares the certiorari petition. See Opp. 4. Once the certiorari petition is filed, the prisoner's sentence will be stayed by either the Court of Criminal Appeals or by this Court, see 28 U. S. C. § 2101(f). This Court will take a few months to rule on the petition. Furthermore, a capital inmate can, and in this case did, extend this time by filing for a petition for rehearing before the Court of Criminal Appeals. See, e.g., Opp. 3. Added together, these stays will give counsel significant time to prepare a petition. In the present case, for example, over a year elapsed between the initial affirmance on direct appeal and denial of certiorari. See *ante*, at 2.

This is more than enough time to investigate and prepare a habeas petition. *Amicus* American Bar Association's survey found that the average amount of attorney time spent to prepare the certiorari petition was 65 hours, while another 305 hours were spent on the initial federal habeas petition. See ABA Brief 8, n. 23. Given the lavish provision for

6. There is nothing novel about a plaintiff needing an attorney to represent him in a case before the legal proceeding is commenced. Civil plaintiffs hire attorneys for that purpose all the time.

7. Nor should there be any particular difficulty in recruiting counsel at this stage of the proceedings. Since payment is guaranteed by federal law, and there is no threat of imminent execution, it should be less difficult to recruit counsel at this stage than after certiorari is denied.

supplementary resources under section 848(q)(4)(B), there will be plenty of time to file an adequate petition.

Furthermore, the initial habeas petition need not be a work of art. It need not be prepared by the same attorney who will represent petitioner for the remainder of the proceedings. See 21 U. S. C. § 848(q)(8) (counsel appointed under section 848(q) can be replaced by "similarly qualified" counsel on motion of counsel or client). In light of the liberal provisions for amendment, it need not even contain every claim. See 28 U. S. C. § 2242; FRCP 15(a). What it must do is "state facts that point to 'a real possibility of constitutional error.'" Advisory Committee Note to Habeas Rule 4 (citation omitted).

There is, of course, some risk of duplicated effort if this Court grants certiorari. This risk, however, is minimal since only a handful of certiorari petitions are granted. Given the drastic solution offered by petitioner, it is a risk well worth running.

The practices that are alleged to have occurred in *Gosch v. Collins*, affirmed 8 F. 3d 20 (CA5 1993), see Brief for Petitioner 6-7, must not sidetrack this proposal. When an initial habeas petition alleging some constitutional violation is filed for the purpose of staying the execution while the case can be better developed, federal courts should not be allowed to sandbag petitioner by denying the petition before he has the opportunity to amend. While it is the duty of federal habeas courts to reject specious claims, they "should not, however, fail to give nonfrivolous claims of constitutional error the careful attention they deserve." *Barefoot v. Estelle*, 463 U. S. 880, 888 (1983). Petitioners like the one in *Gosch* should be given a fair chance to present their claims in their initial habeas proceeding. The practices affirmed in *Gosch* should therefore be formally disapproved.⁸

8. The disapproval should be limited to dismissals of first petitions. Successive petitions brought for the purpose of obtaining a stay are an entirely different matter, and should be summarily dismissed when

The fact that counsel appointed under section 848(q)(4)(B) may find unexhausted claims will not threaten petitioner with loss of his stay. If the state courts are willing to stay the execution while the unexhausted claims are exhausted, there will be no threat to the prisoner. If, however, a state judiciary refuses to stay an execution so that claims may be exhausted, then there "is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" and the exhaustion requirement will not apply. 28 U. S. C. § 2254(c); see *Duckworth v. Serrano*, 454 U. S. 1, 3 (1981); *Marino v. Ragen*, 332 U. S. 561, 564 (1947) (Rutledge, J., concurring). This will not, however, prevent the state from invoking procedural bar against procedurally defaulted claims that were never raised in state court. See *Engle v. Isaac*, 456 U. S. 107, 125-126, n. 28 (1982) (procedurally defaulted claims exempt from the exhaustion requirement).

This solution has the dual advantage of protecting the death row inmates' rights while reducing the delay that is the bane of capital punishment. At the very least it will start collateral attack litigation significantly earlier than under petitioner's proposals. As petitioner has no legitimate interest in invoking habeas corpus for the sole purpose of delaying his execution, this makes *amicus'* solution the superior alternative.

V. The Fifth Circuit's decision protects important interests.

Much of petitioner's case is based on the assumption that the result he favors will serve the greater good. On the other hand, Texas is portrayed as having no legitimate interest in having the Anti-Injunction Act enforced. Its

it is apparent that no exceptions to the procedural default and successive petition rules exist.

desire not to have its executions needlessly stayed by federal courts is derided as not being a "legitimate countervailing interest." See ABA Brief 28.

This view is wrong. Texas, and all other states with death row inmates, have a crucial interest in seeing that the Anti-Injunction Act is followed so that habeas corpus is not invoked as a tool for delaying constitutionally valid sentences. Affirming the court below will uphold these crucial interests without the dire consequences threatened by petitioner and his supporting *amici*.

The first interest protected by the decision below is the rule of law. It is a fundamental tenet of American jurisprudence that courts must decide cases on legal, not pragmatic principles. If the law mandates a particular result, then that result should be followed regardless of whether the result is good "policy." "[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U. S. 726, 730 (1963). The fact that a decision may do particular harm to a party or interest is no argument when the law is clear. "The argument of inconvenience has been pressed upon us with great earnestness. But where the law is clear, this argument can be of no avail" *Ex parte Kearney*, 7 Wheat. (20 U. S.) 38, 45 (1822).

There are also sound pragmatic reasons behind the Fifth Circuit's decision. One of the major problems federal habeas corpus raises in our capital punishment system is delay. "Reexamination of state convictions on federal habeas 'frustrate[s] . . . "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." ' " *McCleskey*, *supra*, 499 U. S., at 491, quoting *Murray v. Carrier*, 477 U. S. 478, 487 (1986) and *Engle v. Isaac*, 456 U. S. 107, 128 (1982). So long as a death row prisoner is under the protection of a federal court, the state cannot render the punishment. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; *but the power*

of a State to pass laws means little if the State cannot enforce them." *Ibid.* (emphasis added).

Allowing federal courts to stay executions before a habeas petition is filed will forge yet one more tool of delay from the Great Writ. Granting a stay before a petition is filed places the case in procedural limbo. While the stay is in effect, the state is prevented from executing its judgment, yet it has no ready means of opposition. Because no habeas petition has been filed, there is no action for the state to oppose. It can file no return, and does not even have the status of party. See *ante*, at 16.

The death row inmate has little reason to leave this limbo. Unless he has a particularly strong case for innocence, an extremely rare event, see *Herrera v. Collins*, 122 L. Ed. 2d 203, 233, 113 S. Ct. 853, 874 (1993) (O'Connor, J., concurring), he will do no better than get a new trial or sentencing hearing. Delay will help most successful habeas petitioners when they are retried or resentenced. "Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." *Isaac*, *supra*, 456 U. S., at 127-128. If the prisoner has a weak case, then delay is his only ally. So long as he can get a court to stay his sentence he has "won." Thus it comes as no surprise that this Court is intimately familiar with the delaying tactics of some death row inmates. See, e.g., *Woodard v. Hutchins*, 464 U. S. 377, 480 (1984) (Powell, J., concurring).

There are claims that prisoners will not use prefiling stays as a delaying tactic. Court supervision, some say, will ensure that the stay is not used as a tool of delay. See ACLU Brief 14. This is an unrealistic view. It is highly unlikely that judicial supervision will keep prefiling stays from becoming another tool of delay.

One problem with court supervision is that the incentives are skewed. At the very least, most death row inmates and

their counsel will have every reason to proceed with all deliberation possible. While counsel may not intentionally delay, the natural desire of attorneys to be as thoroughly prepared as possible and the benefits to the prisoner of delayed judgment can combine to make a compelling case for extreme deliberation.

On the other hand, the nature of the claims limits the enforcement tools available to the supervising court. Because of the extreme consequences, invoking the ultimate sanction of lifting the stay is very unlikely. Given the importance of including all claims in the first habeas petition, see *McCleskey, supra*, 499 U. S., at 494, there will be a natural inclination for many district courts to grant liberal extensions so that all claims may be thoroughly investigated. Because the court will be supervising the work of an attorney, the attorney-client privilege and the work product rule will limit close supervision of counsel's progress. See *Hickman v. Taylor*, 329 U. S. 495 (1947).

Furthermore, the supervising court has no particular interest in expediting prefiling investigation. Federal courts are notoriously overburdened. So long as a prisoner's case is in prefiling limbo it is one less case on an already overcrowded docket. Most federal courts, of course, would not want to unduly delay matters. Nonetheless, delay, whether inadvertent or willful, is a real risk in capital cases. See *In re Blodgett*, 116 L. Ed. 2d 699, 674-675, 112 S. Ct. 674, 676-677 (1992). Prefiling stays will create one more reason for delay.

Amicus ACLU asserts that federal habeas corpus is the chief defense against state judiciaries, which are supposedly incapable of protecting the constitutional rights of capital defendants. See ACLU Brief 23-24.

Neither proposition is true. Habeas corpus is not the most important means of reviewing convictions. "Direct review is the principal avenue for challenging a conviction 'The role of federal habeas proceedings, while important in assuring that constitutional rights are observed,

is secondary and limited.' " *Brecht v. Abrahamson*, 123 L. Ed. 2d 353, 370, 113 S. Ct. 1710, 1719 (1993), quoting *Barefoot v. Estelle*, 463 U. S. 880, 887 (1983) (emphasis added). This is entirely consistent with the trust this Court has in the state courts to follow the Constitution.⁹ 123 L. Ed. 2d, at 372, 113 S. Ct., at 1721.

This case is not about making minor adjustments in the law to protect death row inmates from a parade of horrors. It is about upholding fundamental principles of federalism. Upholding these principles will not lead to any unreviewed executions, see *ante*, at 22-25, but will continue this Court's adherence to the rule of law.

VI. *Demosthenes v. Baal* accurately summarizes the controlling principles.

Demosthenes v. Baal, 495 U. S. 731 (1990) (*per curiam*) is a straightforward application of preexisting principles that constrained the District Court from formulating a rule that sanctions granting pre-petition stays.

Baal states that "federal courts are authorized by the federal habeas statute to interfere with the course of state proceedings only in specified circumstances." *Id.*, at 737. Although no citation is given, this is a statement of the fundamental principle established by the authorities in part II, *ante*. The Anti-Injunction Act bars federal interference absent an exception, and section 2251 is the only relevant exception.

9. It is claimed that roughly 40 percent of state capital convictions are overturned in federal courts. See ACLU Brief 23-24. A study by *amicus* CJLF has shown that this grant rate is not due to the inability or unwillingness of state courts to follow the Constitution, but to other factors, primarily the complexity and instability of this Court's Eighth Amendment jurisprudence. See K. Scheidegger, *Rethinking Habeas Corpus* (1989), reprinted in *Habeas Corpus Issues: Hearings Before the Subcomm. Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 212 (1991).

"Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention." *Ibid.*

CONCLUSION

The decision of the Fifth Circuit should be affirmed.

February, 1994

Respectfully submitted,

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*

*Attorneys for Amicus Curiae
Criminal Justice Legal Foundation*

*Attorney of Record

AMICUS CURIAE

BRIEF

FEB 14 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

**BRIEF AMICUS CURIAE OF THE TARRANT, BEXAR,
DALLAS, AND HARRIS COUNTY DISTRICT
ATTORNEYS IN SUPPORT OF RESPONDENT**

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002

STEVEN C. HILBIG
Criminal District Attorney
Bexar County, Texas
ED F. SHAUGHNESSY
Chief of the Appellate
Section
300 Dolorosa, Suite 5072
San Antonio, Texas 78205

TIM CURRY
Criminal District Attorney
Tarrant County, Texas
BETTY MARSHALL
CHARLES M. MALLIN
EDWARD L. WILKINSON*,
401 W. Belknap
Fort Worth, Texas
76196-0201
(817) 884-1687

JOHN VANCE
Criminal District Attorney
Dallas County, Texas
133 N. Industrial Blvd.,
LB-19
Dallas, Texas 75207

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT.....	2
ARGUMENTS AND AUTHORITIES.....	3
I. The Spangenberg Report Is Flawed, Unreliable, and Therefore Does not Establish the Contention that a "Crisis" in Capital Representation Exists	5
A. <i>The report's sampling of data is unreliable ...</i>	5
B. <i>The report's conclusions are unsupported by the data</i>	8
II. The Resource Center Possesses the Means and Resources to Represent Those Capital Felons for Whom It Fails to Find Separate Pro Bono Counsel.....	14
A. <i>The purpose of the Resource Center</i>	14
B. <i>The resources of the Resource Center</i>	15
C. <i>Similar claims by the Resource Center have been made and rejected by the courts in the past</i>	19
D. <i>The Resource Center has been "intimately" involved in the present case</i>	21
E. <i>Conclusion: the Resource Center, as it has in other, similar cases, has actively represented Petitioner while at the same time claiming that he did not have counsel</i>	26
III. Conclusion: Petitioner's Claim That a "Crisis" Exists in Capital Habeas Litigation Is Not Borne Out By the Spangenberg Report nor the Facts of This Case	27

TABLE OF AUTHORITIES

	Page
CASES	
Bounds v. Smith, 430 U.S. 817 (1977).....	4
Ex parte Lockhart, No. 25,669-01 (Tex. Crim. App. November 22, 1993)	19
Gosch v. Collins, No. SA-93-CA-731, 1993 WL 484624 (W.D. Tex. September 15, 1993).....	20, 21
McFarland v. Collins, 7 F.3d 47 (5th Cir. 1993) ...	24, 25
McFarland v. Collins, 8 F.3d 258 (5th Cir. 1994).....	3, 21, 24, 25, 26
McFarland v. Texas, ___ U.S. ___, 114 S.Ct. 575 (1993)	24
Murry v. Giarrantano, 492 U.S. 1, 10 (1989)	4
CODES	
18 U.S.C. § 3006A(h)(2)(A)(West Supp. 1993)	14
18 U.S.C. § 3006A(h)(2)(B) (West Supp. 1993).....	14, 15
21 U.S.C. § 848(q)(4)(B)	2, 4
28 U.S.C. § 2251.....	2, 4
TEX. GOV'T CODE ANN. § 43.180(a) (Vernon 1988).....	1
TEX. GOV'T CODE ANN. § 43.180(b) (Vernon 1988).....	1
TEX. GOV'T CODE ANN. § 44.001 (Vernon Supp. 1994).....	1
TEX. GOV'T CODE ANN. § 44.115(a) (Vernon 1988).....	1

TABLE OF AUTHORITIES - Continued

	Page
TEX. GOV'T CODE ANN. § 44.157(a) (Vernon 1988).....	1
TEX. GOV'T CODE ANN. § 44.320(a) (Vernon 1988).....	1
OTHER AUTHORITIES	
David S. Moore, <i>Statistics: Concepts and Controversies</i> , (W. H. Freeman & Co. 1979)	7
Edith H. Jones, <i>Death Penalty Procedures: A Proposal for Reform</i> , 53 Tex. Bar J. 850 (1990)	17, 26
Mandy Welch, <i>Death Penalty Chaos Calls for Systematic Changes</i> , TEXAS LAWYER, December 13, 1993	17
Report of the Judicial Conference of the United States on the Federal Defender Program, 53 CrL 2003 (BNA April 7, 1993).....	15, 16
Robert Rosenthal and Ralph L. Rosnow, <i>The Volunteer Subject</i> , (Wiley 1975).....	7
Robert S. Walt, <i>Ending the Death Penalty Chaos</i> , TEXAS LAWYER, December 6, 1993	20, 21
Spangenberg Group, <i>A Study of Representation in Capital Cases in Texas</i> (March 1993)	passim
Texas Appellate Practice and Educational Resource Center IOLTA Grant Application ("IOLTA Grant Application"), Appendix "A"	15, 16, 18
Texas Resource Center Board of Directors, <i>Crisis in Representation of Texas Death Row Inmates</i> (October 26, 1993)	17, 18

INTEREST OF AMICUS CURIAE

The Tarrant County District Attorney is the local elected criminal district attorney for the County of Tarrant, Texas. *See* TEX. GOV'T CODE ANN. § 44.001 (Vernon Supp. 1994); TEX. GOV'T CODE ANN. § 44.320(a) (Vernon 1988). The Tarrant County District Attorney's Office prosecuted and obtained a conviction against Petitioner for capital murder, has defended the conviction on direct appeal in state court, and will represent the State in any subsequent habeas corpus action filed in state court. It thus has an immediate interest in the outcome of the present proceeding.

The Bexar, Dallas, and Harris County District Attorneys are the elected criminal district attorneys for Bexar, Dallas, and Harris counties, Texas. TEX. GOV'T CODE ANN. § 43.180(a), (b) (Vernon 1988); TEX. GOV'T CODE ANN. § 44.001 (Vernon Supp. 1994); TEX. GOV'T CODE ANN. §§ 44.115(a), 44.157(a) (Vernon 1988). Along with the Tarrant County District Attorney, these district attorneys prosecute over 50% of capital murder cases tried in Texas, and defend those convictions on direct appeal and in collateral attacks in both state and federal court. The Tarrant, Bexar, Dallas, and Harris County District Attorneys, then, have an interest in providing the Court with information necessary to a full understanding of the factual and procedural context in which capital cases are litigated in Texas. The Tarrant, Harris, Dallas, and San Antonio County District Attorneys have obtained the consent of both parties to file this brief, and will file the letters confirming their permission with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Tarrant County District Attorney submits this brief as *amicus curiae* because it agrees with Petitioner and his *amicus* counsel that the context surrounding the case is important to the proper resolution of the issue presented.

Petitioner and his *amicus curiae* counsel, relying largely upon "A Study of Representation In Capital Cases in Texas," by the Spangenberg Group, conclude that the capital habeas corpus "situation" in Texas "has passed 'the crisis level and requires immediate attention.'" [Petitioner's Brief at 3 (quoting Spangenberg Group, A Study of Representation in Capital Cases in Texas (March 1993), at ix)]. The "crisis" consists of the purported failure of a number of death row inmates to secure counsel in order to initiate habeas corpus actions. [Petitioner's Brief at 4-6]. Petitioner, and particularly his *amicus* counsel, imply that the inability of capital felons to secure counsel before filing a writ of habeas corpus justifies an interpretation of 21 U.S.C. § 848(q)(4)(B) and 28 U.S.C. § 2251 that would give federal district courts jurisdiction to grant stays of execution and appoint counsel absent the filing of an application for writ of habeas corpus. [Petitioner's Brief at 5-7, 15-18; Brief of the Texas Criminal Defense Lawyers Association at 14-18; Brief of the American Bar Association at 11-13; Brief of the American Civil Liberties Union at 6-7, 13-14].

But the basis of Petitioner's fundamental premise – that there exists a "crisis" of capital litigation – is highly questionable. The study upon which Petitioner and his *amicus curiae* rely is badly flawed and does not establish

Petitioner's presupposition. Similarly, several of the assumptions which underlie Petitioner's and his *amicus* counsels' contention – particularly their assertion that *pro bono* resources throughout the State are unavailable – are not borne out by the facts.

In light of Petitioner and his *amici's* failure to clearly establish their major premise that a "crisis" in capital litigation exists, the logical – and perhaps more important, the moral – force of their argument fails. See *McFarland v. Collins*, 8 F.3d 258, 259-60 (5th Cir. 1994) (Jones, J., dissenting). Petitioner's conclusion that federal courts should be vested with jurisdiction to interfere with state judgments simply on the basis that a "crisis" in representation exists is simply not warranted under the facts.

ARGUMENTS AND AUTHORITIES

Petitioner and his *amicus curiae* counsel, relying principally upon "A Study of Representation In Capital Cases in Texas," by the Spangenberg Group, repeatedly contend that Texas has "faced a looming crisis in the availability of counsel in capital habeas cases." [Brief of Texas Criminal Defense Lawyers Association at 3; Petitioner's Brief at 1-2; Brief of American Bar Association at 1-2]. Counsel further contends that heretofore death-row inmates have been able to secure counsel in spite of this "crisis." [Petitioner's Brief at 4-6; Brief of Texas Criminal Defense Lawyers Association at 3; Brief of the American Bar Association at 3-4].

Petitioner and his *amicus curiae* then maintain that the crush of recent capital convictions has rendered it impossible for condemned inmates to secure counsel and file writs of habeas corpus prior to petitioning federal district courts for a stay of execution and the appointment of counsel literally on the eve of execution. [Petitioner's Brief at 4-5; Brief of Texas Criminal Defense Lawyers Association at 14-16; Brief of the American Bar Association at 2-7]. This state of affairs, they assert, necessitates the conclusion that federal district courts have jurisdiction to enter a stay of execution and to appoint counsel, even though the federal habeas corpus statute, 28 U.S.C. § 2251, dictates that a stay may be issued only by a judge or justice "before whom a habeas corpus proceeding is pending." [Petitioner's Brief at 18-19; Brief of Texas Criminal Defense Lawyers Association at 16-18; Brief of the American Bar Association at 11-13].

Respondent has adequately addressed the issues surrounding the interpretation of 28 U.S.C. § 2251 and 21 U.S.C. § 848(q)(4)(B). *Amicus curiae* seeks instead to respond to Petitioner's contention that a "crisis" exists in capital representation that warrants extending the district courts' jurisdiction to granting stays of execution and appointment of counsel upon a capital felon's mere request.

Petitioner, of course, possesses no right to counsel in the post-conviction stage, *Murry v. Giarrantano*, 492 U.S. 1, 10 (1989), and he fails to assert, much less prove, that he has been denied a right of access to the courts outside the limits of *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

In addition, Petitioner has failed to prove the existence of this "crisis" to the district court by presenting any evidence whatsoever to support his contention. Furthermore, the district court has made no finding of fact regarding such a contention.

Finally, and perhaps most importantly, the studies upon which Petitioner and *amicus curiae* base their assertion are statistically suspect and do not take into consideration the full role that the Texas Resource Center plays in post-conviction death penalty proceedings throughout Texas. Petitioner has thus failed to establish a valid public policy ground to support his assertion that the district courts' jurisdiction should be expanded.

I. The Spangenberg Report Is Flawed, Unreliable, and Therefore Does not Establish the Contention that a "Crisis" in Capital Representation Exists.

Petitioner and his *amicus* counsel depend upon the Spangenberg Group's report, "A Study of Representation in Capital Cases in Texas" ("Spangenberg Report") to support their claim that Texas has reached a "crisis stage" in post-conviction capital felony representation. The study, however, appears seriously flawed in several basic ways, and its unreliability calls into doubt the validity of Petitioner's and his *amicus curiae's* assertion.

A. The report's sampling of data is unreliable.

The principle basis of the report is a survey which purports to quantify certain problems with capital representation in Texas. The report claims "an extensive mail

counsel – even to the point of drafting his motion for stay – while at the same time claiming that it was unable to find counsel to represent him. *Id.* at 8-9. The trial court readily condemned such tactics, terming it an attempt “to manipulate the orderly administration of justice” which brings “discredit and disrespect to our legal system.” *Id.* at 9.

Similarly, in *Gosch v. Collins*, No. SA-93-CA-731, 1993 WL 484624 (W.D. Tex. Sept. 15, 1993), relied upon by Petitioner but unpublished by the district court, the Resource Center presented a manufactured “crisis” and asked for a stay of execution absent the filing of a writ of habeas corpus. In *Gosch*, shortly after the defendant’s petition for writ of certiorari on direct appeal had been filed, he fired his retained counsel on the basis that his representation was being assumed by an attorney from the Center. See Robert S. Walt, Ending the Death Penalty Chaos, TEXAS LAWYER, December 6, 1993, at 20. One week later, the Center obtained the defendant’s trial and appellate records from the Court of Criminal Appeals for copying. *Id.* Ten months later, on June 28, 1993, the defendant’s petition for writ of certiorari to this Court was denied. *Id.*

On July 16, 1993, the trial court set the defendant’s date of execution. *Id.* The Center protested, citing an inability to obtain counsel for the defendant, and asked for 120 days to recruit counsel and an additional 120 for counsel to prepare a petition. Robert S. Walt, Ending the Death Penalty Chaos, TEXAS LAWYER, December 6, 1993, at 20.

The trial court refused, but set the defendant’s execution for almost three months away. *Id.* The Resource Center appeared in federal court three days prior to the scheduled execution, again claiming lack of counsel, but also filing a one-issue habeas petition. *Id.* The district court denied the petition and a stay of execution, even though the state did not oppose the stay. *Id.* See also *Gosch v. Collins*, No. SA-93-CA-731, 1993 WL 484624, at *2 (W.D. Tex. September 15, 1993).

The next day, the Center recruited an attorney for the defendant – the same attorney whom defendant had identified 15 months earlier as the attorney for the Center who had agreed to accept the case and who had recently left the Center for private practice. See Robert S. Walt, Ending the Death Penalty Chaos, TEXAS LAWYER, December 6, 1993. See also *McFarland v. Collins*, 8 F.3d at 259 n.3 (Jones, J., dissenting) (“the Resource Center has in several recent cases used exactly the same tactics – declining to file habeas petitions while trying, at the last minute, to press state and federal courts to grant stays under the pretext of unavailability of counsel,” citing *Gosch*).

D. The Resource Center has been “intimately” involved in the present case.

In the present case the Center was “coordinating” Petitioner’s case as early as January, 1993, well before mandate was issued by the Texas Court of Criminal Appeals. See *McFarland v. Collins*, 8 F.2d at 259 (Jones, J., dissenting); [Joint Appendix at 89]. On August 16, 1993 – more than two months after Petitioner’s petition for writ

of certiorari had been denied, five months after the Court of Criminal Appeals' mandate, eight months after the Center has first acted on the case, and more than 13 months after the original affirmance by the Court of Criminal Appeals – the trial court set Petitioner's execution date for the following September 23, 1993. [Joint Appendix at 4, 89].

On September 19, 1993, the Resource Center sent a letter to the trial judge of the convicting court, Criminal District Court No. 3 of Tarrant County, Texas, in support of the Petitioner's "pro se motion for stay." [Joint Appendix at 6]. However, no such motion had been or was subsequently filed with the court. [Joint Appendix at 89]. The Center, claiming that it had been unable to recruit counsel for Petitioner, asked for 120 additional days in which to recruit counsel and for a further 120 days for counsel to file a petition. [Joint Appendix at 10].

The following day, September 20, 1993, a representative of the Resource Center, Lynn Lamberty, visited Petitioner at the Ellis I Unit of the Texas Department of Criminal Justice – Institutional Division in Huntsville, Texas. [Attorney Application to Visit TDCJ Inmate,⁴ Appendix "C"]. Almost simultaneously, two other representatives of the Resource Center telephoned the attorney for the State handling Petitioner's case, and that attorney's two immediate supervisors, to discuss the possibility of the State agreeing to a stay of execution in the case. [Joint Appendix at 91, 94, 96]. The State outlined its

⁴ This exhibit was presented to the district court without objection, but has not been included in the Joint Appendix.

position – the trial court had no jurisdiction to grant a stay absent the filing of a petition for writ of habeas corpus, but the State would agree to a stay if a petition were filed – but the attorneys for the Center disagreed. [Joint Appendix at 91, 94, 96].

That afternoon, two different representatives of the Resource Center appeared before the judge of Criminal District No. 4 of Tarrant County. [Joint Appendix at 92]. Since the judge of the convicting court was unavailable, the Resource Center asked that the judge of Criminal District Court No. 4 stay Petitioner's execution in his stead. [Joint Appendix at 92]. The judge refused, but did postpone the execution 34 days to October 27, 1993. [Joint Appendix at 12, 18].

On October 13 or 14, 1993, yet another representative of the Resource Center again contacted the Tarrant County District Attorney's Office and asked if the State had altered its position in regard to the filing of a petition for writ of habeas corpus as a prerequisite to jurisdiction in the trial court. [Joint Appendix at 92]. The State reiterated its position, and the matter was not further pursued at that time.

On October 16, 1993, the Resource Center again sent a letter to the trial judge, urging him to stay Petitioner's execution and give the Center 120 days to secure *pro bono* counsel and an additional 120 days for counsel to file a petition. [Joint Appendix at 16]. Three days later, on October 19, 1993, Petitioner was again visited in prison by a representative of the Resource Center. [Attorney Application to Visit TDCJ Inmate, Appendix "B"].

On October 21, 1993, Petitioner filed a "pro se" motion for stay directly in the Court of Criminal Appeals. [Joint Appendix at 21]. The motion had obviously been prepared by the Resource Center, since a Center attorney signed the certificate of service. [Joint Appendix at 23]. Accompanying Petitioner's motion was a letter from the Resource Center asking for 120 days in which to recruit counsel and a further 120 days for counsel to file a petition. [Joint Appendix at 24]. Petitioner, in his motion, specifically asked the court "to give the Center the time [the Center's attorney] requests in the letter to recruit a lawyer for me." [Joint Appendix at 22]. The Court of Criminal Appeals denied the motion the following day. [Joint Appendix at 40]. Petitioner filed a petition for writ of certiorari with this Court seeking review of this decision, which was subsequently denied. *McFarland v. Texas*, ___ U.S. ___, 114 S.Ct. 575 (1993).

Petitioner filed a "pro se" Motion for Stay of Execution and Appointment of Counsel in federal district court on October 26, 1993. *McFarland v. Collins*, 8 F.3d at 258 (Jones, J., dissenting); *McFarland v. Collins*, 7 F.3d 47, 48-49 (5th Cir. 1993) (per curiam); [Joint Appendix at 41]. The motion obviously had been prepared by the Resource Center, since an attorney for the Center signed the certificate of service, the motion was accompanied by a cover letter from the Resource Center dated October 22, 1993, and the motion contained copies of orders from six other cases in which stay had been granted. [Joint Appendix at 45-46]. Petitioner did not file a petition for writ of habeas corpus. *McFarland v. Collins*, 8 F.3d at 258 (Jones, J., dissenting); *McFarland v. Collins*, 7 F.3d at 48; [Joint Appendix at 76].

The district court denied Petitioner's motion, [Joint Appendix at 76], and his request for a certificate of probable cause to appeal. *McFarland v. Collins*, 7 F.3d at 48-49; Joint Appendix at 79. Represented in the Fifth Circuit by Mandy Welch, who designated herself "temporary counsel," Petitioner filed an "Application for Certificate of Probable Cause and Motion for stay of execution." [Joint Appendix at 81]. The Fifth Circuit, noting in passing that Petitioner's appeal had been prepared by the Resource Center, denied his application for certificate of probable cause and motion for stay of execution. *McFarland v. Collins*, 7 F.3d at 49; [Joint Appendix at 86].

Upon the Fifth Circuit's denial of his application for certificate of probable cause and motion for stay of execution, Petitioner sought a writ of certiorari to this Court. The petition, signed by attorneys for the Center, stretched 26 pages, and was obviously prepared by the Center. Petitioner additionally filed a 6 page supplement and a 17 page reply brief, both prepared by the Center.

At the same time that Petitioner filed a petition for writ of certiorari in this Court, he also filed a petition for writ of habeas corpus in federal district court. *See McFarland v. Collins*, 8 F.3d at 258 (Jones, J., dissenting). The application had been prepared by the Center the day before. *Id.* at 259. The district court denied relief. *Id.* Petitioner appealed to the Fifth Circuit, where Respondent waived the requirement of exhaustion as to the single issue raised by Petitioner, and the Fifth Circuit granted a stay of execution. *McFarland v. Collins*, 8 F.2d at 258. Petitioner subsequently dismissed his petition. *McFarland v. Collins*, 8 F.3d 256, 257 (5th Cir. 1994).

The Resource Center, then, has been "intimately" involved in Petitioner's case since before his direct appeal to state court became final. See *McFarland v. Collins*, 8 F.3d at 260 n.4 (Jones, J., dissenting). It has had numerous contacts with him both in person and through correspondence, it has prepared every motion and entreaty submitted to five different courts, it has had at least six different attorneys do some work on the case, and had five attorneys on the case on the same day. As Judge Jones has concluded, "this case became a manufactured procedural emergency long before it reached federal court," and there has been "no legitimate basis for the brinkmanship that has occurred here." *McFarland v. Collins*, 8 F.3d at 259 (Jones, J., dissenting). It is not a "crisis of representation" that threatens to disrupt the orderly progress of Petitioner's capital conviction, but a blatant manipulation of the courts by the Resource Center for the purpose of making it appear that a "crisis" exists.

- E. **Conclusion: the Resource Center, as it has in other, similar cases, has actively represented Petitioner while at the same time claiming that he did not have counsel.**

The "well-staffed" Resource Center, then, has not been prevented either by its express charter nor by its available financial resources from representing Petitioner or other "unrepresented" capital felons. See *McFarland v. Collins*, 8 F.2d at 259 n.3 (Jones, J., dissenting). See also Jones, *supra*, at 851 (In five years on the [federal] bench . . . I have never seen a defendant suffer from lack of legal counsel, nor have I known any defendant to be executed without benefit of representation of counsel").

The Center has in the past declined to file writs of habeas corpus on behalf of an inmate while at the same time pressing state and federal courts to grant stays of execution on the pretext that the inmate has no legal counsel. In the present case, the Center's intimate involvement in all phases of the case belies its contention that Petitioner is unrepresented and that the "crisis" of death-row representation prevents it from working on behalf of capital felons for whom it could not recruit counsel.

III **Conclusion: Petitioner's Claim That a "Crisis" Exists in Capital Habeas Litigation Is Not Borne Out By the Spangenberg Report nor the Facts of This Case.**

Petitioner's assertion that a current "crisis" exists in Texas post-conviction capital litigation fails to take into account the "intimate" involvement of the "well-staffed" and well-financed Resource Center. The claim also relies upon a survey that is, at best, unreliable and which does not support the broad conclusions it contains. Petitioner has thus failed to establish that a "crisis" exists at

all. His arguments based upon this premise, both logical and moral, are therefore unsupported.

Respectfully submitted,

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002

STEVEN C. HILBIG
Criminal District
Attorney
Bexar County, Texas
ED F. SHAUGHNESSY
Chief of the Appellate
Section
300 Dolorosa, Suite 5072
San Antonio, Texas 78205

TIM CURRY
Criminal District Attorney
Tarrant County, Texas
BETTY MARSHALL
CHARLES M. MALLIN
EDWARD L. WILKINSON*,
401 W. Belknap
Fort Worth, Texas
76196-0201
(817) 884-1687

JOHN VANCE
Criminal District Attorney
Dallas County, Texas
133 N. Industrial Blvd.,
LB-19
Dallas, Texas 75207

* Counsel of Record

APPENDIX A

IOLTA (INTEREST ON LAWYERS' TRUST ACCOUNTS) GRANT APPLICATION

PART I - Preliminary Request for Funding

Please complete this Preliminary Request for Funding and return it to the Texas Equal Access to Justice Foundation by February 5, 1993. With the form you should furnish 1) a copy of your organization's Internal Revenue Service 501 (c) (3) determination letter, 2) the counties served form, 3) any funding source monitoring report (except IOLTA's) within the last two years (if applicable), 4) a list of the members of your organization's governing body, identifying lawyer members, client members and representative of another organization, and 5) a one page narrative describing the type of project involved, legal issues to be addressed, organizational structure, and other funding sources. (Current grantees who have previously submitted this documentation need not re-submit it if you have checked your records to be sure there have been no material changes made to the documents since you submitted them.)

Program Name: Texas Appellate Practice & Educational
Resource Center

Name of Applying Organization (if different): _____

Address: 1206 San Antonio Street

Austin TX 78701

Telephone: 512/320-8300

A2

Program Director: Eden E. Harrington, Executive Director

Grant Application Preparer: Eden E. Harrington

Chairperson of Board of Directors or Trustees: Michael Tigar, Esq.

Tax Identification No. 74-2496934

Amount of IOLTA Grant Request: \$150,000

Category (Select one): X Discretionary Poverty
Population

Proposed Use of Requested Funds: Recruiting, Training & Litigation of capital habeas corpus appeals

Faxed applications will not be accepted.

[LOGO]

Texas Equal Access to Justice Foundation

Mailing Address	Office Address
P.O. Box 12886	400 West 15th Street,
Austin, Texas 78711	Suite 712
	Austin, Texas 78701

512-463-1444 or 800-252-3401

[1] Part II: Applicant Description & Request for Funding

Your complete grant application should include the following:

1. This form (Part II: Applicant Description & Request for Funding) and
2. All materials listed on the Checklist of Enclosures on page 2.

A3

- Submit the original plus two copies of item 1.
- Submit only one copy of item 2 (enclosures).
- See "How to Apply" in the cover materials accompanying these application forms for further instructions and for a timetable for the funding process.

RECEIVED MAR 12 1993

A. General Program Information

A. New Application for Funding

xx **B. Previous Grantee**

1. **Organization Name:** Texas Appellate Practice & Educational Resource Center
2. **Street Address:** 1206 San Antonio
Austin TX 78701
Mailing Address: _____

3. **Telephone No.** 512/320-8300 **Fax No.** 512/477-2153
4. **Cities where branch offices are located:** Houston, San Antonio

B. Signatures

Program Director:

**Eden Harrington,
Executive Director**

Print or type name

X _____
/s/ Signature of Program
Director

BEST AVAILABLE COPY

Chairperson of Governing Board:

Michael Tigar
Print or type name

X /s/ Michael E. Tigar
/s/ Signature of
Chairperson of
Governing Board

U.T. Law School, 727 E. 26th St., Austin TX 78705
Business address

512/471-5151
Phone number

Contact Person:

Eden Harrington

[2] C. Grant Request

Applicants Please Note:

Complete ONE Part II for each grant you are requesting.
Photocopy additional forms if required.

Check ONE only:

Low Income Population Grant

Request Amount: \$

xx Discretionary Grant Request Amount: \$150,000.00

Name of Proposed Project	<u>Texas Appellate Practice & Educational Resource Center</u>
--------------------------	---

D. Checklist of Enclosures

Number and enclose the following supplemental materials with this Grant Application. (Current grantee who have previously submitted this documentation need not re-submit it if you have checked your record to be sure there have been no material changes made to the documents since you submitted them.)

A5

Previously Submitted

Enclosed

Attachment
No

XX

Description of your organizations
Affirmative Action/
EEO policy

Calculus

XX

Client Financial Eligibility Guidelines

XX

Description of your organization's professional liability coverage

[3] E. Description of the Applicant Organization

1. Overall Purpose

Provide an overview of the client and/or community needs your organization currently addressed.

The purpose of the Texas Resource Center is to ensure that all indigent death row inmates in Texas have access to competent legal representation for their post-conviction state and federal appeals. Without the Center, many death row inmates would have no legal counsel and no opportunity to attack the validity of their conviction and sentence through the constitutionally-provided appeals process. Texas has the largest death row population in the country, has executed more persons than any other state, and is the only state with a large death row that does not provide counsel to indigent inmates.

2. Overview of Services and Activities

List the nature of the services provided by your organization with special emphasis on legal services for low-income people and related activities. Be sure to complete Attachment A (1), General Case Services, and A (2), Annual Case Summary Report.

When the conviction and sentence of a death row inmate is affirmed on direct appeal, the Center determines whether the inmate's appellate counsel will continue representing him or her. If the inmate is left without an attorney, the Center begins efforts to recruit *pro bono* counsel to take over the case. Our legal staff provides comprehensive litigation support to *pro bono* counsel through case-specific consultation, training, manuals, investigative services, sample pleadings, and assistance with pleadings and court appearances. The Center's attorneys also represent a limited number of death row inmates directly.

3. History of Organization

Give the origin of your organization including length of service to the community.

In 1987, representatives of the state and federal judiciaries and the State Bar met to address the critical need for representation for death row inmates in Texas. The resulting plan depended upon the participation of private attorneys and law firms in this representation on a *pro bono* basis. The plan also required the establishment of a resource center to provide those attorneys and firms with substantive assistance and expert guidance in the complex area of capital habeas corpus law. The University of

Texas Capital Punishment Clinic was designated as the *ad hoc* resource center until, with the overwhelming endorsement of the federal judiciary in Texas, federal funding through the Criminal Justice Act was obtained and the present Texas Resource Center began operation in October 1988.

4. Track Record

Highlight your organization's most significant achievements during the calendar year ending December 31, 1992.

Examples might include:

- "Our organization handled 500 immigration cases."
- "Our three lawyers served 600 clients."

During 1992 the Center's caseload increased significantly. At the beginning of the year Center attorneys were providing substantial assistance to counsel in 103 cases, and were representing 37 clients directly. At the year's end, the Center's legal staff was providing comprehensive support in 168 cases and were directly representing 21 clients. During the year the Center worked with the State Bar and local bar associations to recruit counsel for approximately 15 habeas corpus cases and more than 20 petitions for writ of certiorari to the United States Supreme Court. Center attorneys worked particularly hard providing hands-on assistance to *pro bono* counsel during the crisis litigation surrounding the 111 execution dates scheduled during 1992.

[4] 5. Staff composition

Using the form provided, indicate the number of Full-Time Equivalents (FTEs) within the legal services component of

your organization as of December 31, 1992. A full-time equivalent is one person working full-time – For example, two persons, each working half-time, amount to 1.0 FTE. FTE figures can be expressed in decimals – for example, 1.5 lawyers.

	Staff-in Full-Time Equivalents (FTE)			
	Paid Staff		Tempo- rary	Volun- teer
	Full Time	Part Time Number	FTE	
1. Number of Lawyers	15			
2. Number of Paralegals & Investigators	2			
3. Number of Other Staff	7	5	3.25	
4. Total	24	5	3.25	

6. Service Priorities

Describe your current service priorities and provide the date they were established or last reviewed.

Recruitment of *pro bono* counsel to represent death row inmates in their post-conviction appeals is one of the Center's immediate goals. There [sic] presently a critical backlog of inmates without counsel. The main service priority of the Center is to provide comprehensive assistance and training to the attorneys and law firms that have taken on capital habeas corpus cases. And additional priority is to provide quality direct representation to a limited number of inmates. These priorities were established in 1988 with the creation of the Texas

Resource Center, and are reviewed annually by the Center's staff and Board of Directors.

7. Community Outreach and Public Information Activities

Describe the means by which the majority of potential clients learn about the availability of your organization's services.

The Center's client population is limited to two locations in Texas: the Ellis Units of T.D.C.J. in Huntsville, where male death row inmates are incarcerated; and the Mountain View Unit in Gatesville, where the (current four) women on death row are held. The Center's existence and purpose is widely known within these prison units. In addition, Center attorneys contact all potential clients after their cases have been affirmed by the Court of Criminal Appeals if their appellate attorney indicates that he or she will no longer represent them.

[5] 8. Expenditures on Legal Services for the Poor and Related Activities

Provide a breakdown of your organization's total actual expenditures on legal services and related activities for the calendar year ending December 31, 1992, regardless of funding source.

Categorize expenditures using the Explanation of Categories, Attachment B.

If your organization's fiscal year is different, pro-rate expenditures to cover the calendar year indicated.

Cost Category	Total Expenditures, Calendar Year 1992
PERSONNEL:	
Lawyers	625,318.73
*Paralegals	254,055.50
includes in-kind for students and interns	
Others	321,908.81
Subtotal	1,212,283.04
Employee Benefits	234,765.53
Total Personnel	1,447,048.57
NON-PERSONNEL:	
Space	157,794.61
Equipment rental	61,117.96
Supplies	53,349.71
Telephone	126,764.81
Travel	310,844.12
Training	10,911.30
Library	2,853.44
insurance	5,528.12
Audit	10,379.00
Litigation	311,630.67
Capital additions	233,122.35
Contract services	
Other	54,109.16
Total Non-Personnel	1,338,405.25
Total Expenditures	2,785,453.82
Litigation: Experts copying & repro	
Other: Postage	
Bank Fees	
Recruiting	
Miscellaneous	

[page break] F. *Funding Proposal*

1. *Statement of the Problem to be Addressed*

Describe the client or community needs to be addressed, and state the extent to which these needs are not currently being met.

If the Texas Resource Center did not exist, indigent inmates would be facing execution without having had an opportunity to attack the validity of their conviction and sentence through the appellate process. Texas currently does not provide an indigent death row inmate with an attorney for their constitutionally available habeas corpus appeals, and most inmates do not have counsel to pursue their post-conviction appeals. The Center is the one organization in Texas working to ensure that indigent death row inmates have competent legal counsel. On an ongoing basis, the Center expends significant effort in cooperation with the State Bar and local bar association to recruit *pro bono* counsel for these inmates. More than 85 inmates are presently represented by attorneys recruited through the Center, but 37 inmates currently are without legal counsel. The Center provides substantial continuing assistance and support to the attorneys and law firms representing 168 inmates, and represents approximately 21 individuals directly – out of about 215 post-conviction inmates. The Center's caseload will continue to grow as additional attorneys are recruited to represent the backlog of inmates without counsel. The critical need for the Center's services will increase during the next year as the size of death row continues to expand, the number of inmates without legal

counsel grows, and the recruitment of *pro bono* attorneys and firms becomes ever more difficult.

2. *Proposed Strategies for Addressing the Problem*

Provide an overview of the planned legal services or other activities that will be used to address the needs identified in "1" above.

A primary strategy of the Center will be to focus on recruiting *pro bono* counsel for indigent death row inmates. The Center will continue to work closely with the State Bar, local bar associations, and members of the state and federal judiciaries to plan new recruitment efforts to try to address the present crisis in lack of counsel. Capital habeas corpus litigation is complex and expensive, and it will remain difficult to recruit attorneys for these cases. The main work of the Center will continue to be providing significant litigation support to *pro bono* counsel through formal training sessions, case-specific consultation, sample pleadings, investigative service assistance with pleadings and court appearances, updated manuals, etc. Center attorneys will also maintain a direct representation caseload of 30 to 40 inmates.

3. *Uses for the Requested Funds*

Describe the specific purposes for which the requested funds will be used – for example, hiring specific categories of staff, purchasing specific resources, etc.

IOLTA funding is critical to the existence of the Texas Resource Center. The funds are used to support all aspects of the Center's work (including staff salaries, litigation expenses, production of training material, office

maintenance, etc.) in connection with the state habeas corpus stage litigation. It is not possible to present constitutional claims to the federal courts without first developing and presenting them in the state courts. In order for the Center to receive potentially available federal funds (through the Administrative Office of the U.S. Courts) to support development of constitutional claims and their presentation in federal courts, the Center must raise 20% of its budget from non-federal sources to support the state habeas portion of its work. Without generous funding from the Texas Equal Access to Justice foundation, the Center's entire funding and existence is [in] jeopardy.

[8] 4. *Other Resources that Will Be Employed*

List any resources in addition to this grant that will be used in carrying out the strategies described in "2", page 7, including other funding, donated space, volunteer help, etc.

Eighty percent of the Center's overall budget can potentially be obtained through the Administrative Office of the U.S. Courts if the Center can meet the 20% matching funding requirement. The Center currently receives funds from the Texas Bar Foundation and St. Mary's College of Law, and utilizes generous in-kind support from St. Mary's, the University of Texas Law School, and South Texas College of Law. The Center expects to receive continuing support from those organizations, and is seeking additional funding from the Public Welfare Foundation and other sources.

5. Cooperative Efforts

- a. List the organizations that will actively participate.
See Below
- b. Describe cooperative efforts, if any,

The Center works closely with a number of organizations in trying to ensure that all death row inmates have competent legal representation. The Center works on an ongoing basis with the State Bar, local bar associations and members of the state and federal judiciaries in *pro bono* recruitment efforts. The Center, [sic] In addition, we are involved with several committees of the State Bar, local bar associations, the American Bar Association, University of Texas Law School, St. Mary's College of Law, South Texas College of Law, the Texas Criminal Defense Lawyer's Association, and the National Legal Aid and Defender Association. All of these organizations will continue to support the Resource Center in our efforts to recruit *pro bono* counsel and provide training and assistance to them.

6. Target Populations

Check only ONE of boxes 1, 2, 3, or 4 at the right.

- Check boxes 1-3 if your proposal will provide direct legal services to low-income clients.
- Check box 4 if your proposal is primarily aimed at a different audience – for example, training other legal service providers.

- 1. General low-income population; no specific client groups targeted.

- xx 2. One Low-income client group
If this box is checked, also check below the ONE specific group targeted by your services.

- a. The elderly
- b. Children and/or youth
- c. Women
- d. People with disabilities
- e. Inmates
- f. Immigrants (including refugees)
- g. Migrant workers
- h. Homeless persons
- i. Persons with AIDS
- xx j. One distinct population other than above-specify:
Texas death row inmates

- 3. A combination of low-income groups (a) through (j) above
List all groups targeted: _____

- 4. Other – specify: _____

[9] 7. Legal Problem Types Targeted

Check only ONE box (1,2,3, or 4) at right.

Check "Not Applicable" if your proposed project is not aimed at providing direct legal representation for low-income people.

- 1. Full range of legal problem types
- 2. Particular Problems. If this box is checked, check below all of (a) through (g) that are specifically targeted:

A16

- ☐ a. Domestic violence
- ☐ b. Public benefits
- ☐ c. Housing/homelessness issues
- ☐ d. Immigration
- ☐ e. Employment
- ☐ f. Disability
- ☐ g. Health

xx 3. **Other Problems – specify:**
Constitutionality of conviction and death sen-
tence

☐ 4. **Not applicable – specify reasons:**

8. Size of Eligible Population

Estimate the total number of people eligible for the specific services proposed in this funding request, include in your estimated numbers only those persons who:

- Fit within your proposed target population per item 6, page 8,
 - Qualify as one of the legal problem types this program will address per item 7, above,
 - Are within your geographic service area per Counties Served Form submitted with Part 1, _____
 - Qualify for services under your program's financial eligibility guidelines.
- a. Estimated number of people eligible for your services.
- xx (1) Less than 1,000
- ☐ (2) Between 1,000 and 5,000

A17

- ☒ (3) Between 5,000 and 10,000
- ☐ (4) Between 10,000 and 25,000
- ☐ (5) Between 25,000 and 50,000
- ☐ (6) Between 50,000 and 100,000
- ☐ (7) More than 100,000 –

Specify approximate number: _____

- b. Source and reliability of your estimate – indicate below your data source and an explanation of the reasons why you think the estimates are reliable.

There are currently 367 persons on death row in the state of Texas.

[10] G. Proposed Budget For 1993-94 Grant Year

1. Budget Breakdown

Summarize the total budget for carrying out the strategies described in "F.2". Examples of "b. Anticipated Non-IOLTA Expenditures" include other grants, bar associations funds, etc.

Categorize expenditures using the Explanation of Categories. Attachment B.

Note: Computer users may provide this information in an attached spreadsheet printout that has the same row and column labels as this form.

A18

Cost Category	a. Antici- pated IOLTA Expendi- tures	b. Antici- pated Non- IOLTA Expendi- tures	c. Total Expendi- tures
PERSONNEL:			
Lawyers	59,388	1,353,043	1,412,431
Paralegals	14,440	320,115	334,555
Others	10,322	203,100	213,422
Subtotal	84,150	1,876,258	1,960,408
Employee Benefits	26,950	204,900	231,850
Total Personnel	111,100	2,081,158	2,192,258
NON-PERSONNEL:			
Space	4,315	236,310	240,625
Equipment			
rental	4,210	76,879	81,089
Supplies	4,568	123,645	128,213
Telephone	3,280	148,965	152,245
Travel	6,352	398,695	405,047
Training	1,568	60,395	61,963
Library	2,172	87,770	89,942
Insurance	0	14,491	14,491
Audit	300	13,055	13,355
Litigation	7,560	482,780	490,340
Capital			
additions	0	155,294	155,294
Contract			
services	0	0	0
Other	4,575	33,063	87,638
Total			
Non-Personnel	18,900	1,881,342	1,920,242
TOTAL	150,000	3,962,500	4,112,500

A19

[11] 2. Anticipated Sources of Non-IOLTA Funding

Provide a breakdown, by source, of the total anticipated Non-IOLTA funding shown in column "b" on page 10.

Source	Amount
a. Foundations (other than IOLTA)	\$ _____
b. Filing fees	\$ _____
c. United Way	\$ _____
d. Legal Services Corporation (LSC)	\$ _____
e. City & county funding	\$ _____
f. Church funding	\$ _____
g. Title III - Administration on Aging	\$ _____
h. Law schools	\$ 25,000
i. Attorney fees	\$ _____
j. Bar Associations	\$ _____
k. Title XX - Health & Human Services	\$ _____
l. Other A.O. & In-Kind	\$ 3,937,500
	3,150,000 787,500
*TOTAL	\$ 3,962,500

*Note: This Total should equal the total shown in Column "D" in the budget on page 10.

3. Increases or Reductions In Sources of Non-IOLTA Funding

Report anticipated increases or reductions in funding from sources other than IOLTA and give an explanation for the increase or reduction.

The Center expects to receive increased federal funding from the Administrative Office of the U.S. Courts, due to an increase in the Center's federal habeas corpus caseload. Again, the Center can only receive the potentially available federal funds if 20% matching funding is obtained from non-federal sources. The Center expects support from its other non-federal funding sources to remain at present levels.

[Attachment A(1)] **General Case Services**

Attention Applicants: This section must be completed if your program provides "case services," that is, provides direct legal representation such as counsel and advice, assistance in preparing legal documents, representation in court or administrative proceedings, etc.

Count ALL case services provided by your program, not just the IOLTA-funded services.

If your program does NOT provide case services, check the box below and do not complete the remaining form or attachment A(2).

☐ Not Applicable - We do not provide case services.

Background Information About Case Statistics

The information in this section is important to the Foundation in understanding fully the work you are doing and in describing to others the IOLTA program's impacts.

1. Definition of "Case" Used for Statistical Reporting Purposes

The Foundation requires all grantees to use a uniform definition of "case" (see "a" at right) for statistical reporting purposes, unless special circumstances warrant an exception. If your program used a different definition for compiling the statistics on the annual case summary report, check box "b" at right and give your definition.

Check ONE only:

- ☐ a. We use the Foundation's definition of a "case", which is as follows:

A "case" is a distinct legal problem or a set of closely related legal problems of a client, and legal activities or processes used in resolving those problems. A case includes brief services, such as advice, as well as other types of legal representation. A client with two or more closely related problems will be considered as presenting a single case if all of the problems will be resolved through a single legal process or forum.

- ☒ b. We use a different definition, which is as follows:
An individual client represents a case.

A22

[Attachment A(2)] ANNUAL CASE
SUMMARY REPORT

To be completed for the 1992 calendar year
(January 1, 1992 - December 31, 1992)

Name of Applicant: Texas Appellate Practice & Educational Resource Center

	<u>Male</u>	<u>Female</u>	<u>Total</u>	
	202	4	206	
<u>CLIENT PROFILE</u>	<u>Under 16</u>	<u>18-59</u>	<u>60 and Over</u>	<u>Total</u>
White-Not of Hispanic Origin		90		90
Black-Note of Hispanic Orignin [sic]		84		84
Hispanic		30		30
Native American				
Asian or Pacific Islander		2		2
TOTAL		206		206

Disabled **more than 75% of death row inmates
are mentally or emotionally disabled.

A23

APPENDIX B

ATTORNEY APPLICATION TO VISIT
TDCJ INMATE

Ellis I
(Institution)

I, Lynn Lamberty, a licensed attorney in the State of Texas, with offices at 3223 Smith St., Suite 215 Houston visiting Frank McFarland #963, on Oct 19, 1993, affirm that my visit with this inmate is for the purpose of assisting me in matters related to the attorney-client or attorney-witness relationship and for no other purpose. I agree that any tape recording made by me will be used only to assist this relationship.

/s/ Lynn B. Lamberty
(Signature)

11847050
(State Bar No.)

1-163 (Rev. 11/90)

ATTORNEY APPLICATION TO VISIT
TDCJ INMATE

Ellis I
(Institution)

I, Lynn Lamberty, a licensed attorney in the State of Texas, with offices at 3223 Smith St., Suite 215 Houston visiting Frank McFarland, on 9-20, 1993, affirm that my visit with this inmate is for the purpose of assisting me in matters related to the attorney-client or attorney-witness relationship and for no other purpose. I agree that any

A24

tape recording made by me will be used only to assist this relationship.

/s/ Lynn B. Lamberty
(Signature)

11847050
(State Bar No.)

1-163 (Rev. 11/90)

FEB 14 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1993

FRANKLIN BASIL McFARLAND,

v.

Petitioner,

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA,
ARIZONA, ARKANSAS, COLORADO, DELAWARE,
FLORIDA, IDAHO, KENTUCKY, LOUISIANA,
MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA,
NEVADA, NEW JERSEY, NORTH CAROLINA, OHIO,
OKLAHOMA, PENNSYLVANIA, RHODE ISLAND,
SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA
AND WYOMING AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

DANIEL E. LUNGREN

Attorney General of California

GEORGE WILLIAMSON

Chief Assistant Attorney General

DANE R. GILLETTE

Deputy Attorney General

MARK L. KROTOSKI

*Special Assistant Attorney General

1515 K Street, Suite 603

Sacramento, CA 95814

Telephone: (916) 324-5497

Attorneys for Amici

*Counsel of Record

February 14, 1994

[additional counsel on inside cover]

49/92

JIMMY H. EVANS
Attorney General of
Alabama
Alabama State House
11 South Union Street
Montgomery, AL 36130

GRANT WOODS
Attorney General of
Arizona
1275 West Washington
Phoenix, AZ 85007

WINSTON BRYANT
Attorney General of
Arkansas
200 Tower Building
323 Center Street
Little Rock, AR 72201-2610

GALE A. NORTON
Attorney General of
Colorado
Department of Law
1525 Sherman Street
Denver, CO 80203

CHARLES M. OBERLY, III
Attorney General of
Delaware
8th Floor
820 North French Street
Wilmington, DE 19801

ROBERT A. BUTTERWORTH
Attorney General of
Florida
Department of Legal
Affairs
The Capitol
PL 01
Tallahassee, FL 32399-1050

LARRY ECHOHAWK
Attorney General of Idaho
State House
Room 207
Boise, ID 83720-1000

CHRIS GORMAN
Attorney General of
Kentucky
Capitol Building
P.O. Box 2000
Frankfort, KY 40602-2000

RICHARD P. IEYOUNG
Attorney General of
Louisiana
P.O. Box 94095
Baton Rouge, LA 70804-9095

MIKE MOORE
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205

JEREMIAH W. NIXON
Attorney General of
Missouri
Supreme Court Building
101 High Street
Jefferson City, MO 65102

JOSEPH P. MAZUREK
Attorney General of
Montana
Justice Building
215 North Sanders
Helena, MT 59620

DON STENBERG
Attorney General of
Nebraska
2115 State Capitol
P.O. Box 98920
Lincoln, NE 68509

FRANKIE SUE DEL PAPA
Attorney General of
Nevada
Capitol Complex
Carson City, NV 89710

DEBORAH T. PORITZ
Attorney General of
New Jersey
Department of Law and
Public Safety
Richard J. Hughes Justice
Complex
25 Market Street, CN080
Trenton, NJ 08625-0086

MICHAEL F. EASLEY
Attorney General of
North Carolina
P.O. Box 629
2 East Morgan Street
Raleigh, NC 27602-0629

LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, OH 43266-0410

SUSAN B. LOVING
Attorney General of
Oklahoma
230 N. Lincoln Blvd.,
Room 112
Oklahoma City, OK 73105

ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

JEFFREY B. PINE
Attorney General of
Rhode Island
72 Pine Street
Providence, RI 02903

T. TRAVIS MEDLOCK
Attorney General of
South Carolina
Rembert C. Dennis
Office Building
P.O. Box 11549
Columbia, SC 29211

CHARLES W. BURSON
Attorney General of
Tennessee
500 Charlotte Avenue
Nashville, TN 37243-0497

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

JAMES S. GILMORE, III
Attorney General of
Virginia
5th Floor
101 North 8th Street
Richmond, VA 23219

JOSEPH B. MEYER
Attorney General of
Wyoming
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

Does a federal district court have jurisdiction to stay the enforcement of a state death penalty judgment prior to the filing of a federal habeas corpus petition?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
INTEREST OF <i>AMICI</i>	1
STATEMENT OF FACTS AND PROCEEDINGS.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT	4
I. Stays of Presumptively Final and Valid State Court Judgments Issued By Federal Courts Before the Filing of a Federal Habeas Corpus Petition Impinge On Important State Interests.....	4
II. Federal Courts Lack Statutory Authority to Stay the Enforcement of A Presumptively Final and Valid State Court Judgment <i>Before</i> a Federal Habeas Corpus Petition Has Been Filed.....	8
A. Overview: Is There Any Statutory Basis for a Pre-Petition Stay?	8
B. Anti-Injunction Act: 28 U.S.C. § 2283.....	9
C. Federal Habeas Stay Provision: 28 U.S.C. § 2251	10
1. Plain Meaning Analysis.....	10
2. Legislative History Analysis.....	14
3. The Local Rules in <i>Brown v. Vasquez</i> Violate the Separation of Powers Doctrine and Are Inconsistent with Acts of Congress	17
i. Separation of Powers Doctrine...	18
ii. Inconsistency With Acts of Congress.....	20
iii. Conclusion	21

TABLE OF CONTENTS – Continued

	Page
D. All Writs Act: 28 U.S.C. § 1651(a)	21
E. Anti-Drug Abuse Act of 1988: 21 U.S.C. §§ 848(q)(4)-(10)	24
III. Assuming <i>Arguendo</i> A Pre-Petition Stay Is Permitted, This Court Will Need To Decide (1) Who Holds the Burden, and (2) What Threshold Showing Should Be Required For A Pre-Petition Stay	26
IV. Congress Is the Appropriate Branch to Determine Whether, and Under What Circumstances, Pre-Petition Stays Should Be Permitted	28
CONCLUSION	30
APPENDIX	App. 1
RELEVANT STATUTORY PROVISIONS.....	App. 1
All Writs Act (28 U.S.C. § 1651)	App. 1
Federal Habeas Stay Provision (28 U.S.C. § 2251).....	App. 1
Automatic Stay Provision (1867 Federal Habeas Statute).....	App. 2
Certificate of Probable Cause Requirement (28 U.S.C. § 2253)	App. 2
Anti-Injunction Act (28 U.S.C. § 2283).....	App. 2
Anti-Drug Abuse Act of 1988 (21 U.S.C. §§ 848(q)(4)-(10))	App. 3

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

<i>Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs</i> , 398 U.S. 281 (1970).....	9, 10
<i>Autry v. Estelle</i> , 464 U.S. 1 (1983) (per curiam)	27
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983) ..	5, 14, 15, 27, 28
<i>Bender v. Williamsport Area School District</i> , 475 U.S. 534 (1986)	8
<i>Benson v. State Board of Parole & Probation</i> , 384 F.2d 238 (9th Cir. 1967)	22
<i>Brecht v. Abrahamson</i> , 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)	5, 6
<i>Brittingham v. U.S. Commissioner of Internal Revenue</i> , 451 F.2d 315 (5th Cir. 1971)	22
<i>Browder v. Director, Department of Corrections of Illinois</i> , 434 U.S. 257 (1978)	12
<i>Brown v. Vasquez</i> , 952 F.2d 1164 (9th Cir. 1991), cert. denied, 112 S.Ct. 1778 (1992) ..	17, 18, 19, 20, 21
<i>Bundy v. Wainwright</i> , 808 F.2d 1410 (11th Cir. 1987)	27
<i>Caminetti v. United States</i> , 242 U.S. 470 (1917)	11
<i>Coleman v. Thompson</i> , 501 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)	7, 24
<i>Consumer Product Safety Comm'n v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980)	11
<i>Demosthenes v. Baal</i> , 495 U.S. 731 (1990) (per curiam)	3, 9, 26, 29
<i>Ex Parte Royall</i> , 117 U.S. 241 (1886)	10

TABLE OF AUTHORITIES - Continued

Page

<i>Fox v. Kelso</i> , 911 F.2d 563 (11th Cir. 1990)	26
<i>Frazier v. Heebe</i> , 482 U.S. 641 (1987)	20
<i>FTC v. Dean Foods Co.</i> , 384 U.S. 597 (1966)	23
<i>Garcia v. United States</i> , 469 U.S. 70 (1984)	14
<i>Griffin v. Oceanic Contractors, Inc.</i> , 458 U.S. 564 (1982)	11
<i>Hill v. Lockhart</i> , 992 F.2d 801 (8th Cir. 1993)	25
<i>Hilton v. Braunskill</i> , 481 U.S. 770 (1987)	12
<i>Hooks v. Wainwright</i> , 540 F. Supp. 652 (M.D. Fla. 1982)	13
<i>Immigration and Naturalization Service v. Chadha</i> , 462 U.S. 919 (1983)	18, 19, 20, 29
<i>In re Blodgett</i> , 503 U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (per curiam)	3, 5, 6, 19, 29
<i>In re Connaway</i> , 178 U.S. 421 (1900)	12
<i>In re Lindsey</i> , 875 F.2d 1518 (11th Cir. 1989) (per curiam)	12, 25
<i>In re Lindsey</i> , 875 F.2d 1502 (11th Cir. 1989) (per curiam)	26
<i>In re Shibuya Jugiro</i> , 140 U.S. 291 (1891)	15
<i>Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee</i> , 456 U.S. 694 (1982)	8, 20
<i>Jackson v. Vasquez</i> , 1 F.3d 885 (9th Cir. 1993)	22
<i>Lambert v. Barrett</i> , 159 U.S. 660 (1895)	14, 15
<i>Mackey v. United States</i> , 401 U.S. 667 (1971)	6
<i>McCleskey v. Zant</i> , 499 U.S. 467 (1991)	5, 6, 7

TABLE OF AUTHORITIES - Continued

	Page
<i>McFarland v. Collins</i> , 114 S.Ct. 544, 126 L.Ed.2d 446 (1993)	2
<i>McFarland v. Collins</i> , 8 F.3d 258 (5th Cir. 1993).....	7, 28
<i>McFarland v. Collins</i> , 8 F.3d 256 (5th Cir. 1993) (per curiam)	23
<i>McFarland v. Collins</i> , 7 F.3d 47 (5th Cir.) (per curiam), cert. granted, 114 S.Ct. 544 (1993)...	2, 9, 12, 13
<i>McFarland v. Collins</i> , No. 4:93-CV-714-A (N.D. Tex. Oct. 2, 1993)	2
<i>McFarland v. Texas</i> , 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993)	2
<i>McKinney v. Paskett</i> , 753 F. Supp. 861 (D. Idaho 1990).....	26
<i>M'Intire v. Wood</i> , 11 U.S. (7 Cranch) 504 (1813).....	21
<i>Mitchum v. Foster</i> , 407 U.S. 225 (1972).....	9, 10, 19, 25
<i>Murray v. Giarratano</i> , 492 U.S. 1 (1989)	24, 30
<i>Pennsylvania Bureau of Correction v. U.S. Marshals Service</i> , 474 U.S. 34 (1985)	21, 22
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987)	24
<i>Reese v. Teets</i> , 248 F.2d 147 (9th Cir. 1957).....	13
<i>Rogers v. Peck</i> , 199 U.S. 425 (1905)	14
<i>Rose v. Lundy</i> , 455 U.S. 509 (1982).....	7, 13, 27
<i>Rosenbaum v. Bauer</i> , 120 U.S. 450 (1887)	22
<i>Sampson v. Murray</i> , 415 U.S. 61 (1974).....	23
<i>Sawyer v. Whitley</i> , 505 U.S. ___, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).....	4, 28

TABLE OF AUTHORITIES - Continued

	Page
<i>St. John v. North Carolina</i> , 745 F. Supp. 1165 (W.D.N.C. 1990)	27
<i>United States ex rel. Wisconsin v. First Federal Savings & Loan Ass'n</i> , 248 F.2d 804 (7th Cir. 1957), cert. denied, 355 U.S. 957 (1958)	22
<i>United States v. Rojas-Contreras</i> , 474 U.S. 231 (1985)	14
<i>United States v. Weber Aircraft Corp.</i> , 465 U.S. 792 (1984)	14
<i>Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.</i> , 263 U.S. 629 (1924)	20
STATE CASES:	
<i>McFarland v. State</i> , 845 S.W.2d 824 (Tex. Crim. App. 1992), cert. denied, 113 S.Ct. 2937 (1993)	2
U. S. CONSTITUTION:	
U.S. Const. art. I, § 1 (bicameralism requirement)	19
U.S. Const. art. I, § 7, cl. 2 (bicameralism requirement and Presentment Clause).....	19
U.S. Const. art. I, § 7, cl. 3 (bicameralism requirement and Presentment Clause).....	19
U.S. Const. art. I, § 8, cl. 1 (Spending Clause).....	19
FEDERAL STATUTES AND RULES:	
21 U.S.C. § 848(q)	4, 10, 24, 25
21 U.S.C. § 848(q)(4)(B)	24
21 U.S.C. §§ 848(q)(4)-(10)	24

TABLE OF AUTHORITIES - Continued

	Page
21 U.S.C. § 848(q)(8).....	25
28 U.S.C. § 1651(a)	4, 21
28 U.S.C. § 2071(a)	20
28 U.S.C. § 2242.....	12
28 U.S.C. § 2243.....	13
28 U.S.C. § 2251.....	<i>passim</i>
28 U.S.C. § 2253.....	15, 28
28 U.S.C. § 2254.....	9, 24
28 U.S.C. § 2254 Rule 2(a)	12
28 U.S.C. § 2254 Rule 2(c)	12
28 U.S.C. § 2254 Rule 2(e)	12
28 U.S.C. § 2254 Rule 11.....	12
28 U.S.C. § 2283.....	3, 9, 29
Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335.....	9
Act of March 2, 1793, ch. 22, § 7, 1 Stat. 335.....	20
Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.....	14
Act of March 3, 1893, ch. 226, 27 Stat. 751.....	14
Act of Feb. 13, 1925, ch. 229, § 8(c), 43 Stat. 940	14
Act of June 19, 1934, ch. 673, 48 Stat. 1177.....	16
Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869.....	16
Pub. L. 100-690, Title VII, § 7001, 102 Stat. 4387, 4393-94.....	24

TABLE OF AUTHORITIES - Continued

	Page
Advisory Committee Note to Habeas Corpus Rule 2 (1976)	12
Advisory Committee Note to Habeas Corpus Rule 3 (1976)	12, 23
Advisory Committee Note to Habeas Corpus Rule 4 (1976)	12, 13
Fed. R. Civ. P. 3.....	12
Fed. R. Civ. P. 82.....	20
Fed. R. Civ. P. 83.....	20
FEDERAL RULES OF COURT:	
Rule 37.5 of the U.S. Supreme Court.....	2
Rule 26.8.7(b) of the U.S. District Court for the Central District of California.....	17
Rule 26.8.7(c) of the U.S. District Court for the Central District of California.....	18
CONGRESSIONAL RECORD, REPORTS AND LEGISLATION:	
78 Cong. Rec. 10,755-56 (June 7, 1934)	16
78 Cong. Rec. 12,366-67 (June 18, 1934)	16
H.R. Rep. No. 308, 80th Cong., 1st Sess. A179, A265 (1947)	16
H.R. Rep. No. 1726, 73d Cong., 2d Sess. 1 (1934)	14, 15, 16
S. Rep. No. 1426, 73d Cong., 2d Sess. 2 (1934)	14
S. 1441, § 3(b), 103d Cong., 1st Sess., 139 Cong. Rec. S10,927 (daily ed. Aug. 6, 1993).....	19

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

<i>Black's Law Dictionary</i> (6th ed. 1990).....	11
Judicial Conference of the United States, Report and Proposal of the Ad Hoc Committee on Fed- eral Habeas Corpus in Capital Cases (Aug. 23, 1989).....	9, 19
D. Lungren & M. Krotoski, <i>Public Policy Lessons from the Robert Alton Harris Case</i> , 40 UCLA L. Rev. 295 (1992).....	9, 15, 29
Petitioner's Brief on the Merits	7
L. Powell, <i>Commentary: Capital Punishment</i> , 102 Harv. L. Rev. 1035 (1989)	5
<i>Webster's New World Dictionary of the American Language</i> (1982 2d college ed.)	11
C. Wright, <i>Law of Federal Courts</i> (4th ed. 1983)	8, 20
12 C. Wright & A. Miller, <i>Federal Practice & Pro- cedure</i> (1973 ed.).....	20

No. 93-6497

In The

Supreme Court of the United States

October Term, 1993

FRANKLIN BASIL McFARLAND,

v.

Petitioner,

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA,
ARIZONA, ARKANSAS, COLORADO, DELAWARE,
FLORIDA, IDAHO, KENTUCKY, LOUISIANA,
MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA,
NEVADA, NEW JERSEY, NORTH CAROLINA, OHIO,
OKLAHOMA, PENNSYLVANIA, RHODE ISLAND,
SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA
AND WYOMING AS AMICI CURIAE
IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

This case presents important questions concerning the fair and timely enforcement of presumptively final and valid state court judgments. *Amici* are States which have an interest in finality, the enforcement of their state laws, and the orderly and proper administration of their

criminal justice systems. These important interests are threatened when federal courts grant stays in state court proceedings prior to the filing of a federal habeas petition. Additionally, *amici* have comity concerns about the ability of federal courts to stay state court proceedings in our federal system.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the U.S. Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

Petitioner Franklin Basil McFarland was convicted and sentenced to death for aggravated sexual assault and murder. *See McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). This Court denied direct review. *McFarland v. Texas*, 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993).

In the U.S. District Court for the Northern District of Texas, petitioner filed a motion for a stay of execution and a request for appointment of counsel to prepare a federal habeas petition. The motion and a request for a certificate of probable cause were denied because the court concluded it lacked jurisdiction to issue a stay in the absence of a pending habeas corpus proceeding. *McFarland v. Collins*, No. 4:93-CV-714-A (N.D. Tex. Oct. 2, 1993).

In the U.S. Court of Appeals for the Fifth Circuit, petitioner then applied for a certificate of probable cause and filed a motion for stay of execution and a request for appointment of counsel. *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993) (per curiam). In denying the request, the Fifth Circuit held no stay could issue under the federal habeas statute because there was no "pending" habeas petition. *Id.* at 49. Alternatively, the court noted, petitioner had failed to "make the minimal showing necessary to establish entitlement to a stay." *Id.* This Court granted certiorari review. *McFarland v. Collins*, 114 S.Ct. 544, 126 L.Ed.2d 446 (1993).

SUMMARY OF ARGUMENT

This case presents a question of statutory construction: Is there any federal statute which confers jurisdiction on a federal habeas court to stay enforcement of a state court judgment *prior* to the filing of a petition for a writ of habeas corpus ("pre-petition stay")? Petitioner essentially asks the Court to stretch the applicability of existing statutes and to permit automatic stays in all potential federal habeas corpus death penalty proceedings where only an application for appointment of counsel is submitted. Only Congress can establish this policy, including what threshold requirements should be satisfied before the petitioner may avail himself or herself of the federal forum.

In all habeas proceedings, the burden lies with the petitioner to establish that his or her constitutional or federal rights were violated. In this case, petitioner asks this Court to establish a policy for the first time that would result in automatic delay prior to the commencement of any actual habeas proceeding. Without any showing that substantial constitutional rights may be at stake, the criminal justice interest in finality cannot be so easily displaced.

For 201 years, the Anti-Injunction Act has prohibited federal court stays of state court proceedings, absent narrow exceptions. 28 U.S.C. § 2283. No exception under this statute permits pre-petition stays. Additionally, as this Court has recognized, a stay of state court proceedings by a federal court is a significant intrusion into the sovereign power of the States to administer criminal justice systems and enforce lawful judgments. *See, e.g., In re Blodgett*, 503 U.S. ___, 112 S.Ct. 674, 676, 116 L.Ed.2d 669, 674 (1992) (per curiam); *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990) (per curiam). The intrusion in this case is exacerbated by the fact that there is no jurisdiction for a federal court to issue a pre-petition stay.

The plain language of the federal habeas stay provision, 28 U.S.C. § 2251, requires a habeas petition to be filed before a federal court holds jurisdiction to stay a

state court judgment. In fact, the legislative history to this provision illustrates the history of abuse resulting from automatic stays. In 1934 Congress abolished the automatic stay which had operated in all habeas corpus proceedings since 1867. This was necessary to curb the abusive delay which resulted from the automatic stay. For sixty years, Congress has not changed this policy.

Other statutes do not permit pre-petition stays. The All Writs Act permits federal courts to issue writs "in aid of" their jurisdiction only *after* jurisdiction has vested (*i.e.*, a habeas petition has been filed). See 28 U.S.C. § 1651(a). Provisions under the Anti-Drug Abuse Act of 1988 have not modified the stay standards contained in section 2251, which are still controlling. See 21 U.S.C. § 848(q). Section 2251 is the sole provision in the federal habeas statute concerning federal stays of state court proceedings. Its terms continue to govern habeas proceedings.

Assuming *arguendo* this Court would permit pre-petition stays under current law, it will be necessary to determine (1) who holds the burden to obtain a stay, and (2) what threshold showing would have to be satisfied before a pre-petition stay could issue. *Amici* respectfully submit that Congress is the proper branch of government to determine whether, and under what circumstances, pre-petition stays should be permitted. Congress is in the best position to balance the divergent interests at stake and resolve such policy questions as whether appropriation of funds for the pre-petition appointment of counsel is warranted.

ARGUMENT

I. Stays of Presumptively Final and Valid State Court Judgments Issued By Federal Courts Before the Filing of a Federal Habeas Corpus Petition Impinge On Important State Interests

There are multiple opportunities for, and potential sources of, delay in the federal habeas process. See, *e.g.*, *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514, 2520 n.7, 120 L.Ed.2d 269, 281 n.7 (1992) ("condemn[ing] . . . any

efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution"); *In re Blodgett*, 503 U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (*per curiam*) (federal court delay). This case presents questions concerning the spectre of "pre-petition" delay; that is, delay occasioned *before* a federal habeas petition has been filed.

When considering the issue of delay in federal habeas corpus proceedings, one must remain mindful of the "secondary and limited" function of collateral review. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); see also *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1719-20, 123 L.Ed.2d 353 (1993). In a federal habeas proceeding, the petitioner brings a civil action to challenge an otherwise presumptively final and valid state court criminal conviction and sentence. *Barefoot*, 463 U.S. at 887. The burden therefore correctly lies with the petitioner to establish that his or her constitutional or federal rights were in fact violated before the state court judgment can be disturbed.

Federal habeas litigation – while sometimes necessary to vindicate important federal rights – is not without its costs. Any delay entails at least "the potential for prejudice to the State." *Blodgett*, 112 S.Ct. at 676, 116 L.Ed.2d at 674. The enforcement of the state court judgment is suspended pending final resolution of the collateral attack. *Id.* "Neither innocence nor just punishment can be vindicated until the final judgment is known." See *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). Victims of the crime – and their family members and friends – cannot attain closure until there is finality. Delay also undermines the deterrence objectives of criminal law. See, *e.g.*, L. Powell, *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035, 1035 (1989) (noting the "years of delay between sentencing and execution . . . undermine[] the deterrent effect of capital punishment"). In the event a second state trial is required, its outcome and accuracy may turn on

the reliability and availability of any remaining "stale" evidence. *See, e.g., McCleskey*, 499 U.S. at 492; *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring and dissenting).

While any delay in the collateral review process levies costs on the criminal justice system, pre-petition delay exacts its own unique consequences. The price of this delay at this incipient stage is particularly high since there has been no showing that substantial constitutional rights may be in issue. Without such a showing, the petitioner is in a "no lose" situation in obtaining this delay, receiving the benefit of an automatic pre-petition stay and lacking any meaningful incentive to investigate or initiate a possible federal habeas corpus case promptly. Moreover, this pre-petition delay typically permits subsequently appointed counsel to engage in a "fishing expedition" to search for *potential* collateral issues to relitigate and fosters the use of federal habeas corpus in a manner it was never intended to be used. *See, e.g., Brecht*, 113 S.Ct. at 1719, 123 L.Ed.2d at 369-70, (discussing distinction between direct and collateral review). In the meantime, a pre-petition stay casts doubt on the ultimate finality of the presumptively valid state court judgment. This "no lose" situation occurs all within the shield of a federal court stay of state court proceedings and *prior* to any *pending* federal habeas action. Moreover, as has become common in many habeas cases, there will likely be further delays *after* a habeas petition is actually filed.

In *Blodgett*, this Court referred to the "severe prejudice" sustained by the State from a prolonged stay of execution and failure of the federal court to resolve the case. 112 S.Ct. at 676, 116 L.Ed.2d at 674. Substantial delay is also likely to result from requests for pre-petition stays.¹ This may appear to be a minimal burden in the

¹ In some federal district courts, for example, a petitioner may obtain a stay for nearly six months *prior* to the filing of a

context of a *single* case. This *initial* delay, however, may likely be augmented by other delay *after* a habeas petition is filed. Moreover, *amici* are concerned with the overall effect automatic pre-petition stays would have on the enforcement of substantive state criminal law and state court judgments in *all potential* habeas cases.

Significantly, the history of the federal habeas corpus statute provides a policy warning to be heeded. During the first 67 years under the federal habeas statute – when stays were automatic – they were abused as a tactic for delay. *See* notes 22 to 25, *infra*, and accompanying text. Congress, ultimately curbed this abuse by eliminating automatic stays. Only Congress can decide whether the existing statutory prohibition against automatic stays should be modified. In fact, in this case serious questions have already been raised concerning "a manufactured procedural emergency" and the absence of any "legitimate basis for the brinkmanship that has occurred here." *McFarland v. Collins*, 8 F.3d 258, 259 (5th Cir. 1993) (Jones, J., dissenting).

Finally, important comity concerns are implicated in this case. The federalism ramifications under the federal habeas statute are already well-recognized.² The exercise of federal court stay authority here also affects delicate comity concerns under the Anti-Injunction Act. For 201

petition without any threshold showing that meritorious claims may ultimately be alleged. *See* note 27, *infra*. In this case, the Texas Resource Center asked the state court to "grant new counsel at least 120 days to investigate, research, prepare and file [a] habeas petition." Petitioner's Brief on the Merits, at 9 (citation omitted; emphasis added).

² *See, e.g., Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2559, 115 L.Ed.2d 640 (1991) (noting "most of the price paid for federal review of state prisoner claims is paid by the States"); *McCleskey*, 499 U.S. at 491; *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).

years, Congress has maintained a policy expressly precluding federal court stays of state court actions, subject to narrow limitations. See note 5, *infra*. The plenary authority of federal courts to stay state court proceedings has historically been reserved for the most extraordinary circumstances and exercised only after a specific showing has been made that substantial rights or interests are in jeopardy. In contrast, the petitioner's position would make pre-petition stays the norm in virtually all federal habeas capital cases.

II. Federal Courts Lack Statutory Authority to Stay the Enforcement of A Presumptively Final and Valid State Court Judgment Before a Federal Habeas Corpus Petition Has Been Filed

A. Overview: Is There Any Statutory Basis for a Pre-Petition Stay?

Three fundamental propositions pertain to the matter at bar. *First*, federal courts have limited jurisdiction and may resolve only those cases over which express authority has been conferred by the U.S. Constitution or a congressional statute.³ *Second*, federal habeas corpus review of state court judgments is a statutory remedy, not a constitutional one.⁴ *Third*, the Anti-Injunction Act, in pertinent

³ See, e.g., *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982); see also C. Wright, *Law of Federal Courts*, at 22 (4th ed. 1983) ("The presumption is that the court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists.").

⁴ As one respected judicial committee has noted: Contrary to what may be assumed, the Constitution does not provide for federal habeas corpus review of state court decisions. The writ of habeas corpus available to state prisoners is not that mentioned in the

part, requires express authority for a federal court to issue a stay involving a state court proceeding. 28 U.S.C. § 2283.

It follows from these three propositions that an express source of *statutory* authority must be identified before a federal habeas court may issue a pre-petition stay in a state court proceeding. As this Court has aptly noted, "federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings *only in specified circumstances*. Before granting a stay, therefore, federal courts must make certain that *an adequate basis exists for the exercise of federal power*." *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990) (per curiam) (emphasis added).

Resolution of this issue of statutory construction will therefore turn on whether Congress has expressly authorized federal courts to issue pre-petition stays. The Fifth Circuit correctly held that no such authority exists. *McFarland*, 7 F.3d at 49. In contrast, the petitioner asks this Court to stretch the statutory language to cover situations it was never intended to reach. Congress, not the judiciary, is the proper branch to entertain such a proposal.

B. Anti-Injunction Act: 28 U.S.C. § 2283

The Anti-Injunction Act has long prohibited federal court stays of state court proceedings.⁵ The Act's only

Constitution. It has evolved from a statute enacted by Congress in 1867, now codified at 28 U.S.C. § 2254. Judicial Conference of the United States, Report and Proposal of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, at 4 n.2 (Aug. 23, 1989) [hereinafter *Powell Committee Report*]; see also D. Lungren & M. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. Rev. 295, 300 & n.15 (1992) [hereinafter *Public Policy Lessons*] (distinguishing three forms of habeas corpus).

⁵ See 28 U.S.C. § 2283 (reproduced in Appendix); *Mitchum v. Foster*, 407 U.S. 225, 231-36 (1972) (discussing history of statute); Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335; see also *Atlantic Coast*

pertinent exception for the matter at bar is the "expressly authorized by Act of Congress" exception.⁶ As this Court has succinctly framed the inquiry before, if a stay under any federal statute prior to the filing of a habeas petition "is not an 'expressly authorized' statutory exception, the anti-injunction law *absolutely prohibits* in such an action all federal equitable intervention in a pending state court proceeding, whether civil or criminal, and *regardless of how extraordinary the particular circumstances may be.*" *Mitchum*, 407 U.S. at 229 (emphasis added). None of the federal statutes identified by the petitioner – including (1) the federal habeas stay provision; (2) the All Writs Act; and (3) 21 U.S.C. § 848(q), as established by the Anti-Drug Abuse Act of 1988 – provides that a pre-petition stay qualifies under this exception.

C. Federal Habeas Stay Provision: 28 U.S.C. § 2251

1. Plain Meaning Analysis

The federal habeas statute contains only one provision concerning the authority of federal habeas courts to stay state court proceedings. 28 U.S.C. § 2251 (reproduced in Appendix). While section 2251 does constitute an exception to the Anti-Injunction Act,⁷ it does not authorize pre-petition stays. A stay may issue under this provision only *after* a habeas proceeding has commenced (*i.e.*,

Line R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286 (1970) (noting statute serves as "an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions"); *id.* at 287 (noting "the exception should not be enlarged by loose statutory construction").

⁶ See, e.g., *Mitchum*, 407 U.S. at 235-36 (discussing limited applicability of remaining two exceptions).

⁷ See *Ex Parte Royall*, 117 U.S. 241, 248-49 (1886); see also *Mitchum*, 407 U.S. at 234-35 & n.16.

federal jurisdiction has vested upon the filing of a habeas petition).

The plain meaning of the language resolves the issue.⁸ On its terms, a stay of state court proceedings may issue under the statute *only* when "a habeas corpus proceeding is *pending*" before the federal judge. 28 U.S.C. § 2251 (emphasis added). The plain meaning of "pending" refers to that period between an initiating and concluding act. "Pending" is defined as "[b]egun, but not yet completed. . . . Thus, an action or suit is 'pending' from its inception until the rendition of final judgment."⁹ The statute also requires the habeas action to be pending "before" a federal judge; in other words, the habeas case is "being considered, judged, or decided by" the federal judge.¹⁰

The federal habeas statute defines the obligations and requirements which must be met before the federal habeas judicial process may be invoked (*i.e.*, when federal court jurisdiction vests). As with other civil cases, the inception of a federal habeas proceeding occurs upon the

⁸ Statutory language is normally conclusive in discerning legislative intent. See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (plain meaning rule).

⁹ *Black's Law Dictionary*, 1134 (6th ed. 1990); see also *Webster's New World Dictionary of the American Language*, 1051 (1982 2d college ed.) ("throughout the course or process of; during").

The term "pending" is also used in the last sentence of the statute, further demonstrating that Congress intended section 2251 stays only in the context of an existing habeas petition in federal court. See 28 U.S.C. § 2251 (noting where no federal stay issues "any such [state] proceeding shall be as valid as if no habeas corpus proceedings or appeal were *pending*") (emphasis added).

¹⁰ *Webster's New World Dictionary of the American Language*, 127 (1982 2d college ed.).

filing of the first pleading.¹¹ To commence a federal habeas action, a state prisoner must submit an "application . . . in the form of a petition for a writ of habeas corpus."¹² Among other things, fact pleading is required and the petition must "specify all the grounds for relief which are available to the petitioner" and be "signed under penalty of perjury."¹³ An insufficient petition may be returned.¹⁴ Once the petitioner has satisfied his or her "responsibilities," the clerk of the district court is "require[d] to file the petition."¹⁵ A preliminary review of the petition is promptly made by the district court, which

¹¹ See *In re Connaway*, 178 U.S. 421, 427-28 (1900) (cited in *McFarland*, 7 F.3d at 49); Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.") (cited in *McFarland*, 7 F.3d at 49); see also 28 U.S.C. § 2254 Rule 11 (noting Fed. R. Civ. P. may apply to habeas petitions "to the extent that they are not inconsistent with" the Federal Habeas Rules); *In re Lindsey*, 875 F.2d 1518, 1519 (11th Cir. 1989) (per curiam). Federal habeas review is a civil proceeding. See *Hilton v. Braunskill*, 481 U.S. 770, 776 & n.5 (1987); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 257 (1978).

¹² 28 U.S.C. § 2254 Rule 2(a); see also Advisory Committee Note to Habeas Corpus Rule 2 (1976) (noting "requirements of the actual petition"); 28 U.S.C. § 2242 (same).

¹³ 28 U.S.C. § 2254 Rule 2(c); see also *id.* (petition must set forth "in summary form the facts supporting each of the grounds"); Advisory Committee Note to Habeas Corpus Rule 4 (1976) (noting fact pleading, not notice pleading, is required); 28 U.S.C. § 2242 (fact pleading requirement).

¹⁴ 28 U.S.C. § 2254 Rule 2(e); see also Advisory Committee Note to Habeas Corpus Rule 2 (1976) ("Any failure to comply with the requirements of rules 2 or 3 is grounds for insufficiency.").

¹⁵ Advisory Committee Note to Habeas Corpus Rule 3 (1976); see also *id.* ("If [the petition complies with the requirements of rules 2 and 3], it must be filed and entered on the docket in the clerk's office.").

is under a "duty . . . to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer."¹⁶ Further, any claims should be exhausted before being presented on federal habeas review. See *Rose*, 455 U.S. at 522.

A review of the language and the statutory requirements makes clear that the condition precedent for a stay is the commencement of a habeas proceeding by means of proper application.¹⁷ Since a habeas proceeding is not "commenced" with the filing of a request for the appointment of counsel, federal courts are not vested with jurisdiction to issue pre-petition stays. In sum, a pre-petition stay does not qualify under the "expressly authorized" exception to the Anti-Injunction Act because section 2251 does not supply the jurisdictional basis for such a stay.

¹⁶ Advisory Committee Note to Habeas Corpus Rule 4 (1976); see also 28 U.S.C. § 2243.

¹⁷ In addition to the Fifth Circuit, *McFarland*, 7 F.3d at 49, this construction also comports with the statutory interpretation of section 2251 by other courts. See *Hooks v. Wainwright*, 540 F. Supp. 652, 654, 655 (M.D. Fla. 1982) (Section 2251 "authorizes a federal judge to stay a proceeding against any person detained pursuant to a state court judgment, but only in connection with a habeas corpus proceeding. . . . [F]ederal judicial authority to stay execution of a sentence imposed in a state criminal proceeding is limited to cases in which the court's habeas corpus jurisdiction has been properly invoked.") (emphasis added); see also *Reese v. Teets*, 248 F.2d 147, 149 (9th Cir. 1957) (noting a district court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus"; holding it is improper to issue a section 2251 stay where the exhaustion requirement has not been met).

2. Legislative History Analysis

Any possible doubt concerning the construction of section 2251 is resolved by a legislative history analysis.¹⁸ From 1867 to 1934, the federal habeas statute provided for an automatic stay of all state court proceedings pending resolution of a filed petition for writ of habeas corpus and any subsequent appeal.¹⁹ Significantly, under this language, the automatic stay was triggered by the filing of a federal habeas proceeding and remained in effect until any federal appeals were resolved.²⁰

¹⁸ The plain meaning of the language of a statute is ordinarily conclusive, absent a statutory ambiguity, contrary legislative intent which is clearly articulated, or other exceptional circumstances. See, e.g., *United States v. Rojas-Contreras*, 474 U.S. 231, 235 (1985); *Garcia v. United States*, 469 U.S. 70, 75 (1984); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984).

¹⁹ See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (first habeas corpus statute permitting federal court review of state court judgments) (reproduced, in pertinent part, in Appendix); see also *Barefoot*, 463 U.S. at 892 n.3 (discussing automatic stay provision in 1867 statute). Two subsequent amendments to this provision did not substantively modify this automatic stay language. See Act of March 3, 1893, ch. 226, 27 Stat. 751 (six month time limit for appeals); Act of Feb. 13, 1925, ch. 229, § 8(c), 43 Stat. 940 (three month time limit for appeals); see also H.R. Rep. No. 1726, 73d Cong., 2d Sess. 1 (1934) (discussing 1934 amendment); *id.* at 2 (comparing proposed 1934 amendment to prior law); see also S. Rep. No. 1426, 73d Cong., 2d Sess. 2 (1934) (same).

²⁰ In addition to the statutory language of the 1867 statute (reproduced, in pertinent part, in the Appendix), see *Rogers v. Peck*, 199 U.S. 425, 436 (1905) (The stay provision "requires the state courts and authorities to make no order and entertain no proceeding which shall interfere with the full examination and final judgment in a *habeas corpus* proceeding in the Federal courts."); *Lambert v. Barrett*, 159 U.S. 660, 662 (1895) ("[N]o order staying proceedings under state authority is made a condition to such stay, the bare pendency of the appeal has that effect.");

On at least two occasions, Congress has amended the federal habeas statute to correct patterns of abusive delay. Congress adopted the certificate of probable cause requirement in 1908 to curb the practice of frivolous habeas appeals filed for delay purposes.²¹ Under this provision, federal habeas appeals are not automatic as a judicial determination must first be made that a habeas appeal is warranted. See 28 U.S.C. § 2253 (reproduced in Appendix). In 1934, Congress abolished the automatic stay rule because it too had been used as a delay tactic. According to the House report:

[The automatic stay provision] gives defendants in criminal cases in State courts a powerful weapon to delay a trial and possibly defeat the ends of justice. The effect of the pending bill is to amend the existing law so as to abolish automatic stays under such circumstances and to provide that the State-court proceedings shall be stayed only if the Federal judge grants a stay in the exercise of discretion.²²

Under the 1934 amendment, the stay could be issued "by a judge of any court of the United States in which are

In re Shibuya Jugiro, 140 U.S. 291, 295 (1891) ("[T]he jurisdiction of the state court . . . is restrained only pending the proceedings in the courts of the United States, and until final judgment therein.").

²¹ See *Barefoot*, 463 U.S. at 892 n.3 (discussing history of certificate of probable cause requirement); see also *Public Policy Lessons, supra*, at 307-08 (same).

²² H.R. Rep. No. 1726, 73d Cong., 2d Sess. 1 (1934); see also *id.* at 2 (Attorney General letter concerning purpose of legislation); *Lambert*, 159 U.S. at 662 (noting the stay provision has been used to pursue "many appeals . . . on inadequate and insufficient grounds").

pending any such [habeas] proceedings or appeal."²³ The new condition precedent required the exercise of judicial discretion to determine whether to issue a stay once jurisdiction had been vested. No further substantive changes have been made to this "pending" language.²⁴

In addition to the amendment language, the 1934 Senate debate makes clear that the stay could issue only after a habeas petition had been filed (*i.e.*, after federal jurisdiction had vested). During this debate, Senator Walsh noted that "[t]his bill merely amends the law so as to make a stay of proceedings in a State court discretionary with the Federal judge *before whom petition for habeas corpus, originally or on appeal, is pending.*" 78 Cong. Rec. 12,366-67 (June 18, 1934) (emphasis added). Senator Robinson also described the nature of the problem with current law as one where "[a] stay of execution has been issued *under a habeas corpus proceeding*, which makes it impossible to reach a conclusion in the [state] case within a reasonable time." *Id.* at 12,366 (emphasis added). After this brief debate, the Senate adopted the legislation.²⁵

²³ Act of June 19, 1934, ch. 673, 48 Stat. 1177; *see also* H.R. Rep. No. 1726, 73d Cong., 2d Sess. 2 (1934) (emphasis added) (comparing proposed amendment to existing law).

²⁴ *See* 28 U.S.C. § 2251, *as amended by* Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 966-67 (revision of title 28, U.S. Code); *see also* H.R. Rep. No. 308, 80th Cong., 1st Sess. A179, A265 (1947) (same).

²⁵ *See* 78 Cong. Rec. 12,367. The Senate debate on the legislation also referred to one particular Massachusetts murder case in which the automatic stay had been used for purposes of delay. *See id.* at 12,366-67 (June 18, 1934) (remarks of Sen. Walsh); *see also* H.R. Rep. No. 1726, 73d Cong., 2d Sess. 1-2 (1934) (discussing same case).

There was no substantive debate in the House concerning the legislation. *See* 78 Cong. Rec. 10,755-56 (June 7, 1934) (approving legislation).

The legislative history for section 2251 demonstrates that Congress acted to end abusive delay by abolishing the automatic stay and requiring the exercise of judicial judgment on whether a stay should issue after the habeas proceeding had commenced. Critically for the petitioner, there is no support in the legislative history for the proposition that the section 2251 stay could issue *before* federal habeas jurisdiction had vested in a federal court by virtue of a filed habeas petition.

3. The Local Rules in *Brown v. Vasquez* Violate the Separation of Powers Doctrine and Are Inconsistent with Acts of Congress

Contrary to the plain meaning and legislative history of the statute, the Ninth Circuit has held that section 2251, in conjunction with two local rules, furnishes a district court with jurisdiction to stay an execution before a federal habeas petition is filed so that a state prisoner may apply for the appointment of counsel.²⁶ In *Brown v. Vasquez* – rejected by the Fifth Circuit and relied upon by petitioner – two local rules permitted entry of a stay for at least 165 days *before* the filing of any habeas petition.²⁷

²⁶ *See Brown v. Vasquez*, 952 F.2d 1164, 1165 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992). In *Brown*, the Ninth Circuit acknowledged that a habeas petition, within the meaning of the federal statute, had not been filed. Instead, the petitioner filed a request for counsel to aid in the preparation of a habeas petition. *See id.* at 1166 & n.7. The court held that "a habeas corpus proceeding is *pending* before a federal district court when . . . an application [for the appointment of counsel] is filed." *Id.* at 1169 (emphasis added).

²⁷ One local rule of the U.S. District Court for the Central District of California provided an automatic 45-day stay of execution upon the filing of an application for appointment of counsel and temporary stay of execution. *See Brown*, 952 F.2d at 1165 n.1 (reproducing Local Rule 26.8.7(b)). Another local rule also permitted a stay of an additional 120 days "to allow newly

A close examination of these automatic stay rules – a *sine qua non* to the *Brown* rationale and holding, see *Brown*, 952 F.2d at 1168, 1169 – shows they were adopted in violation of the Separation of Powers Doctrine and are inconsistent with Acts of Congress. Consequently, *Brown* does not support petitioner's position.

i. Separation of Powers Doctrine

The Separation of Powers Doctrine operates to ensure that "each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, *even to accomplish desirable objectives*, must be resisted." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983) (emphasis added).

Only the Legislative Branch – not a district court – can enact the stay policy embodied by the local rules in *Brown*. For at least four reasons, these local rules constituted "an exercise of legislative power" since they "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . all outside the Legislative Branch." *Id.* at 952.

First, the action altered the obligations and relations of habeas petitioners and the State in federal habeas corpus proceedings. Significantly, under the local rules, enforcement of a presumptively final and valid state court judgment was denied for at least 165 days by the automatic stay provisions. This Court has already recognized that federal court stays frustrate the State "from

appointed counsel to prepare and file the [habeas] petition." See *id.* at 1165 n.2 (reproducing Local Rule 26.8.7(c)). The validity of these local rules was not contested in *Brown*. See *id.* at 1168. Similar local rules operate in each of the other district courts in California.

exercising its sovereign power to enforce the criminal law." *Blodgett*, 112 S.Ct. at 676, 116 L.Ed.2d at 674.

Second, the local rules circumscribe the long-standing congressional prohibition against federal court stays under the Anti-Injunction Act. Only Congress can accomplish this result, as it has in other contexts. See, e.g., *Mitchum*, 407 U.S. at 234-35 (listing federal statutes qualifying under the "expressly authorized" exception to the Anti-Injunction Act).

Third, the fact that the local rules constitute a legislative act is further demonstrated by recent habeas reform legislation concerning federal court stays. In the current Congress, for example, legislation was introduced in the Senate which would permit a stay of execution in capital cases "upon application to any court that would have jurisdiction over a habeas corpus petition."²⁸

Fourth, only Congress, holding the power of the purse, can determine whether, and under what circumstances, federal funds for the appointment of counsel should be appropriated during the pre-petition stage. See U.S. Const. art. I, § 8, cl. 1 (Spending Clause).

Yet, "[w]ithout the challenged [local rules], this [automatic stay] could have been achieved, if at all, only by legislation." *Chadha*, 462 U.S. at 953-54. Moreover, the local rules in *Brown* do not qualify as one of the "narrow, explicit, and separately justified" exceptions to the constitutional requirement that all legislation satisfy the Presentment Clauses and bicameral requirement of the Constitution. See *id.* at 956; U.S. Const. art. I, §§ 1 & 7, cls. 2 & 3. Therefore, the promulgation of the local rules bypassed the "step-by-step, deliberate and deliberative" legislative process and avoided "essential constitutional

²⁸ S. 1441, § 3(b), 103d Cong., 1st Sess., 139 Cong. Rec. S10,927 (daily ed. Aug. 6, 1993); see also *Powell Committee Report*, at 13-14, 15-16, *supra* (habeas corpus reform proposal, § 2257(a) providing for the mandatory stay of execution following the appointment of counsel after certain conditions have been met).

functions," *id.* at 959, 951, including constitutional safeguards that ensure legislative accountability. *id.* at 946-51, 957-59 (discussing constitutional objectives of the Presentment Clauses and bicameral requirement).

Just as "parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress," C. Wright, *Law of Federal Courts*, at 23 (4th ed. 1983), neither can a federal court establish jurisdiction to issue pre-petition stays by a local rule when such jurisdiction does not exist pursuant to the Constitution or federal statute.²⁹ The local rules invoked in *Brown* usurp legislative power in violation of the Separation of Powers Doctrine.

ii. Inconsistency With Acts of Congress

The local rules in *Brown* also transgress statutory limits on the ability of federal courts to adopt local rules. Federal courts may not expand or confer jurisdiction which does not previously exist under the Constitution or federal statutes. *See* note 29, *supra*. Since 1793, Congress has specified that local rules of court "shall be consistent with Acts of Congress."³⁰

Unlike matters such as the regulation of the federal bar, *see, e.g., Frazier v. Heebe*, 482 U.S. 641, 646 n.4 (1987),

²⁹ *See, e.g., Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635 (1924) ("[N]o rule of court can enlarge or restrict jurisdiction."); *cf. Insurance Corp. of Ireland*, 456 U.S. at 711 (Powell, J., concurring in judgment) ("As courts of limited jurisdiction, the federal district courts possess no warrant to create jurisdictional law of their own.").

³⁰ 28 U.S.C. § 2071(a); 12 C. Wright & A. Miller, *Federal Practice & Procedure*, § 3151, at 216 (1973 ed.) (citing Act of March 2, 1793, ch. 22, § 7, 1 Stat. 335); *cf. Fed. R. Civ. P. 82* (noting the Fed. R. Civ. P. "shall not be construed to extend . . . the jurisdiction of the" U.S. district courts); *Fed. R. Civ. P. 83* (local district court rules may be adopted which are "not inconsistent with" the Fed. R. Civ. P.).

Congress has not left to the federal courts to determine, or expand the circumstances, when state court proceedings may be stayed. Since 1793, Congress has clearly and consistently established a general policy prohibiting such stays in the Anti-Injunction Act. *See* note 5, *supra* (referring to history of statute). The local rules are inconsistent with the Anti-Injunction Act because only Congress can specify when the "expressly authorized" exception may apply.

The local rules are also inconsistent with section 2251, which, as a condition precedent, requires federal jurisdiction to vest by the filing of a habeas petition before a federal court may stay state court proceedings. As already noted, the legislative history to section 2251 clearly establishes that Congress rejected the prior automatic stay provision; stays may only be granted upon the filing of a habeas petition and after the exercise of judicial discretion.

iii. Conclusion

Because the local rules in *Brown* not only violate the Separation of Powers Doctrine, but are also inconsistent with Acts of Congress, *Brown* provides no support for the petitioner's argument.

D. All Writs Act: 28 U.S.C. § 1651(a)

The All Writs Act also does not supply a statutory basis for pre-petition stays.³¹ The All Writs Act only enables federal courts to issue writs "in aid of" their jurisdiction which has already vested. It has been long-recognized that the statute does not furnish federal district

³¹ *See* 28 U.S.C. § 1651(a) (reproduced in Appendix); *see also Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34, 40-42 (1985) (discussing legislative history).

courts with an *independent* basis for jurisdiction.³² As already noted, federal habeas jurisdiction does not vest until a habeas petition has been filed. Therefore, the All Writs Act cannot qualify under the "expressly authorized" exception to the Anti-Injunction Act.

Moreover, to conclude that the All Writs Act permits pre-petition stays would circumvent the requirements of the federal habeas statute, a proposition this Court has previously rejected in a related habeas context.³³ The exclusive stay provision in the federal habeas statute is section 2251. Therefore, even assuming *arguendo* the All Writs Act could be used in a pre-petition context, the federal court ability to issue a stay is controlled by the terms of section 2251.

³² See *Rosenbaum v. Bauer*, 120 U.S. 450, 454, 458-59 (1887); *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813); see also *Jackson v. Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993); *Brittingham v. U.S. Commissioner of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971); *Benson v. State Board of Parole & Probation*, 384 F.2d 238, 239-40 (9th Cir. 1967); *United States ex rel. Wisconsin v. First Federal Savings & Loan Ass'n*, 248 F.2d 804, 808-09 (7th Cir. 1957), cert. denied, 355 U.S. 957 (1958).

³³ In construing the All Writs Act in conjunction with the federal habeas statute, this Court noted:

The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

Pennsylvania Bureau of Correction, 474 U.S. at 43; see also *id.* at 42 n.7 (distinguishing other All Writs Act cases since "the habeas corpus statute already expressly provides for" the circumstance in question).

Additionally, federal district courts are courts of limited jurisdiction. See note 3, *supra*. If the All Writs Act is construed to permit pre-petition stays there would be no real, discernible limit to the ability of federal habeas courts to stay state court proceedings. Such a result should not be construed without more explicit direction from the Congress.³⁴

³⁴ Petitioner attempts to rely upon *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), modified, *Sampson v. Murray*, 415 U.S. 61 (1974), involving the validity of a corporate merger under antitrust laws, for the proposition that a pre-petition stay of state court proceedings may issue to preserve the "prospective" habeas jurisdiction of a U.S. District Court. For at least two reasons, this case is inapplicable. First, the holding in *Dean Foods* has subsequently been limited by this Court to those narrow circumstances where it would be "virtually impossible" for further federal review, "frustrat[ing]" the "congressional grant of authority." *Sampson v. Murray*, 415 U.S. 61, 77 n.33 (1974). This case does not qualify under this limitation. Under the requirements established by the Congress, pursuit of the statutory habeas corpus remedy fully lies with the petitioner. Petitioner therefore has the "responsibilit[y]," under the congressional grant, to meet all the requirements to file a habeas petition. Advisory Committee Note to Habeas Corpus Rule 3 (1976). In fact, petitioner has already filed and dismissed a federal habeas petition. See *McFarland v. Collins*, 8 F.3d 256, 257 (5th Cir. 1993) (per curiam). Second, *Dean Foods* arose in a distinguishable circumstance, where a federal court of appeals had jurisdiction to review the enforcement action of a federal agency. In contrast, the matter at bar involves the sensitive comity and federalism concerns of the power of a federal court to stay state court proceedings in a civil collateral challenge to a state criminal court judgment. Clearly, these federal avenues of review serve wholly different objectives in our federal system.

E. Anti-Drug Abuse Act of 1988: 21 U.S.C. §§ 848(q)(4)-(10)

Because there is no constitutional right to counsel in federal or state post-conviction proceedings,³⁵ any right to counsel must be the product of a legislative determination. In the Anti-Drug Abuse Act of 1988, Congress adopted appointment of counsel standards for federal habeas capital cases when certain conditions are met.³⁶ These provisions clearly augment, but do not supplant, the federal habeas statute. See 21 U.S.C. § 848(q)(4)(B) (applicable to "post-conviction proceedings under" 28 U.S.C. § 2254).

For at least three reasons, these provisions do not authorize pre-petition stays. *First*, no language in section 848(q) indicates that Congress intended to modify in any manner the substantive standards concerning stays of state court proceedings contained in the federal habeas corpus statute. See 28 U.S.C. § 2251. No language in section 848(q) provides that federal courts may issue pre-petition stays in state court proceedings. No language suggests that Congress sought to modify the requirements for filing a habeas petition, which are a condition precedent for section 2251 stays. There is also no indication in section 848(q) that Congress changed its longstanding prohibition against automatic stays embodied in section 2251.

³⁵ See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); see also *Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (Opinion of Rehnquist, C.J.) (noting "the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in non-capital cases").

³⁶ See 21 U.S.C. §§ 848(q)(4)-(10), Pub. L. 100-690, Title VII, § 7001, 102 Stat. 4387, 4393-94 (reproduced in Appendix). The scant legislative history on these provisions sheds no dispositive light concerning the issues raised in the matter at bar. There are also no House or Senate reports concerning these provisions.

Further, there is no hint from the language in section 848(q) that Congress sought to establish a new exception to the Anti-Injunction Act and provide federal courts with new authority to stay state court proceedings. Compare *Mitchum*, 407 U.S. at 234-35 (listing federal statutes qualifying under the "expressly authorized" exception to the Anti-Injunction Act). Absent an affirmative expression by the Congress to the contrary, this Court should not otherwise interfere with the delicate federal-state balance struck by Congress in the Anti-Injunction Act.

Second, where Congress intended the 1988 amendments to affect state proceedings, it clearly knew how to accomplish this result. One provision provides that counsel appointed under the 1988 amendments "shall also represent the defendant in . . . proceedings for executive or other clemency as may be available to the defendant." 21 U.S.C. § 848(q)(8). Clemency proceedings usually follow the conclusion of post-conviction proceedings and typically occur on the eve of a scheduled execution. Congress likely concluded that appointed counsel – who by the time of any clemency proceedings would be intimately familiar with the facts and legal questions in the case – should be under a duty to assist with this stage of the capital case. In contrast, there is nothing in the language to suggest that any other state court proceedings would be affected by the 1988 amendments, including a pre-petition stay of state court proceedings. If Congress had desired to permit pre-petition stays or modify the federal habeas stay standard, it would have done so explicitly.

Finally, federal courts which have construed this provision have held that appointment of counsel under section 848(q) may be made only when there is a pending non-frivolous federal habeas petition.³⁷

³⁷ See *Lindsey*, 875 F.2d at 1519; see also *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993) (holding "district court must be

Section 2251 is the sole provision in the federal habeas statute concerning federal stays of state court proceedings. Its terms continue to govern habeas proceedings, even following the 1988 amendments.

III. Assuming *Arguendo* A Pre-Petition Stay Is Permitted, This Court Will Need To Decide (1) Who Holds the Burden, and (2) What Threshold Showing Should Be Required For A Pre-Petition Stay

Assuming *arguendo* this Court concludes a federal district court may issue a pre-petition stay, the question will turn to the proper threshold showing the petitioner must make to obtain a pre-petition stay of a presumptively valid and final state court judgment. In other words, what are the "specified circumstances" and "adequate basis . . . for the exercise of [this] federal power" and intrusion into state proceedings before a federal habeas proceeding has commenced? *Demosthenes*, 495 U.S. at 737. Two policy questions must be resolved in defining the threshold standard for pre-petition stays. First, who holds the burden? Second, what should the burden be?

In a federal habeas proceeding, the burden appropriately lies with the petitioner to establish that his or her constitutional or federal rights have been violated. *See, e.g., Fox v. Kelso*, 911 F.2d 563, 569-70 (11th Cir. 1990). Until such a showing has been made in the civil post-

satisfied, [*inter alia*], that the request for [counsel compensation in state clemency proceeding] is made as part of a non-frivolous federal habeas corpus proceeding"); *In re Lindsey*, 875 F.2d 1502, 1507 (11th Cir. 1989) (per curiam) ("Because Congress did not so state, we conclude that, unless and until he returns to federal court with a petition for habeas corpus setting forth only claims for which he has exhausted all state remedies, [petitioner] has no entitlement" to federally-appointed counsel under section 848(q)); *McKinney v. Paskett*, 753 F. Supp. 861, 865 (D. Idaho 1990).

conviction proceeding, a presumption of validity and finality attaches to the state court criminal judgment. *See, e.g., Barefoot*, 436 U.S. at 887. Similarly, a petitioner traditionally has the burden to establish he or she is entitled to injunctive relief in a federal habeas proceeding.

With regard to the specific burden to be met, even in first habeas petitions reviewed by this Court, "[s]tays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari."³⁸ At minimum, the threshold standard should not be less stringent than that employed for the stay of an execution under section 2251 *after* a habeas petition has been filed.³⁹

In considering possible threshold standards for a pre-petition stay, it is also useful to compare the requirements for obtaining relief in other habeas contexts. In each, the exercise of judicial judgment is required to determine, as a condition precedent, that the request is not frivolous and may be warranted. For example, as already noted, Congress has established requirements for the filing of a federal habeas petition. The district court may dismiss the petition if it is insufficient or frivolous or if claims have not been exhausted. *See* notes 12 to 16, *supra*; *Rose*,

³⁸ *Barefoot*, 463 U.S. at 895; *see also Autry v. Estelle*, 464 U.S. 1, 2 (1983) (per curiam) ("Nor are we inclined to adopt a rule calling for an automatic stay, regardless of the merits of the claims presented, where the applicant is seeking review of the denial of his first federal habeas corpus petition.").

³⁹ The Eleventh Circuit, for example, employs a four-part standard:

[1] whether the movant has made a showing of likelihood of success on the merits and [2] of irreparable injury if the stay is not granted, [3] whether the stay would substantially harm other parties, and [4] whether granting the stay would serve the public interest.

Bundy v. Wainwright, 808 F.2d 1410, 1421 (11th Cir. 1987); *see also St. John v. North Carolina*, 745 F. Supp. 1165, 1167 (W.D.N.C. 1990) (noting stay of execution standards in other jurisdictions).

455 U.S. at 522 (discussing exhaustion requirement). Similarly, the certificate of probable cause requirement imposes an important judicial screening function. 28 U.S.C. § 2253. Before the denial of a habeas petition in the district court may be reviewed on appeal, the petitioner must make a "substantial showing of the denial of [a] federal right." *Barefoot*, 463 U.S. at 893 (citation omitted).

Several other relevant matters bear on the proper threshold standard. For example, in considering a pre-petition application for a stay, how should a federal court treat serious questions, as raised here, concerning "a manufactured procedural emergency"? *McFarland*, 8 F.3d at 259 (Jones, J., dissenting); see also *Sawyer*, 112 S.Ct. at 2520 n.7, 120 L.Ed.2d at 281 n.7 (condemning deliberate last minute delay by some habeas petitioners). How long may a state court proceeding be stayed pending the appointment of counsel at the pre-petition stage of a habeas proceeding? Should extensions be permitted? Compare *Blodgett*, 112 S.Ct. at 674, 116 L.Ed.2d at 674 (establishing *Blodgett* duty on federal habeas courts issuing stays).

These existing habeas standards may be useful to contemplate if the Court decides to consider the proper standard for pre-petition stays. In sum, petitioner should hold the burden to establish the requisite showing to justify a federal court stay. Moreover, these illustrations reiterate that Congress really is the best forum to make these policy determinations.

IV. Congress Is the Appropriate Branch to Determine Whether, and Under What Circumstances, Pre-Petition Stays Should Be Permitted

Federal habeas corpus review of state court judgments is a statutory creation, established for the first time in 1867. See notes 4 & 19, *supra*. Congress plainly may

expand or retract the availability of the statutory writ of habeas corpus, as it has in the past.⁴⁰

The history of the statutory writ shows that Congress abolished the automatic stay provision in 1934 because it was being abused as a delay tactic. For sixty years Congress has not modified this policy. Any expansion on the ability of federal courts to stay the enforcement of a state court judgment in advance of the filing of a federal habeas petition involves an act of legislative power. See *Chadha*, 462 U.S. at 952 (defining "exercise of legislative power").

Moreover, Congress is the appropriate branch to determine whether any modification of section 2251 is warranted. Among other things, the use of the federal court stay authority implicates sensitive comity interests in our federal system. See 28 U.S.C. § 2283; see also *Blodgett*, 112 S.Ct. at 676, 116 L.Ed.2d at 674; *Demosthenes*, 495 U.S. at 737. Congress is in the best position to balance these concerns, after fully assessing the many divergent interests affected by federal habeas proceedings. See, e.g., *Public Policy Lessons, supra*, at 298 (noting divergent interests). Congress would also be directly accountable for any legislative changes. This also includes policy determinations whether federal funds should be appropriated for the compensation of counsel during the pre-petition phase. In fact, Congress has before it legislation which may modify the authority of federal habeas courts to stay state court proceedings, as part of an omnibus reform of the federal habeas statute. See note 28, *supra*. As Justice O'Connor has previously recognized, the circumstances surrounding the appointment of counsel in post-conviction proceedings are "one of legislative choice based on

⁴⁰ See, e.g., notes 21 to 24, and accompanying text, *supra* (discussing elimination of automatic stay under section 2251 and establishment of certificate of probable cause requirement); *Public Policy Lessons, supra*, at 307-08 (discussing certificate of probable cause requirement).

difficult policy considerations and the allocation of scarce legal resources." *Murray*, 492 U.S. at 13 (O'Connor, J., concurring). Until and unless Congress does so, there is no statutory authority for lower federal courts to stay the enforcement of presumptively valid and final state court judgments *prior* to the filing of a federal habeas petition.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

Dated: February 14, 1994

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

DANE R. GILLETTE
Deputy Attorney General

*MARK L. KROTOSKI
Special Assistant Attorney General

1515 K Street, Suite 603
Sacramento, California 95814
(916) 324-5497

Attorneys for Amici

*Counsel of Record

APPENDIX RELEVANT STATUTORY PROVISIONS

* * *

All Writs Act

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

* * *

Federal Habeas Stay Provision

28 U.S.C. § 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

* * *

**Automatic Stay Provision
(1867 Federal Habeas Statute)**

Act of Feb. 5, 1867, § 1, ch. 28, 14 Stat. 385 (first habeas corpus statute permitting federal court review of state court judgments) (codified as amended at 28 U.S.C. § 2251), providing in pertinent part:

[P]ending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.

* * *

Certificate of Probable Cause Requirement

28 U.S.C. § 2253.

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus

proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

* * *

Anti-Injunction Act

28 U.S.C. § 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

* * *

Anti-Drug Abuse Act of 1988:

21 U.S.C. §§ 848(q)(4)-(10)

21 U.S.C. § 848. Appeal in capital cases; counsel for financially unable defendants

(q)(4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either -

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other

services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications,¹ for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to

¹ The phrase "applications, for writ of certiorari" so in original subsec. (q)(8).

App. 6

be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

* * *
